SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 557

VINCENT PACELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

VINCENT PACELLI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vincent Pacelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on July 18, 1966.*

Citations to Opinions Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit are as yet unreported and are printed as Appendices A and B hereto. The District Court wrote an opinion on a pretrial motion which is reported at 251 F. Supp. 702, which is printed as Appendix C hereto.

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* Co-appellants Kahn and Schawartzberg in the Court of Appeals below, are, we believe, perfecting petitions for writs of certiorari. However, as they moved for reargument in the Court of Appeals, their petitions are due to be filed at a later date.

Jurisdiction

The judgment of the Circuit Court of Appeals was rendered on July 18, 1966. Mr. Justice Harlan extended the petitioner's time in which to file a petition for a writ of certiorari to September 16, 1966. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

Questions Presented

1.(a) In a criminal trial for obstructing justice and conspiring to obstruct justice, where one co-defendant rested at the end of the Government's case and took no further part in the examination of witnesses, did the Trial Court err in refusing the defendant's requested instruction that the testimony of the co-defendant who testified in her own behalf should not be considered and that only testimony on the Government's case should be considered by the jury in determining his guilt, thereby denying the defendant the effective assistance of counsel and the right to a jury trial?

(b) Should not this Court, in the light of reason and experience and in the exercise of its supervisory powers over the administration of criminal justice in the United States courts, hold, in view of the fact that this is a question of first impression, that a defendant in a joint criminal trial who rests at the end of the Government's case and does not examine witnesses, even if he is not entitled to a severance, is entitled to go to the jury solely on the evidence presented by the Government?

2. Did the placing of electronic recording equipment on a Government witness so as to record conversations with a co-defendant violate petitioner's rights?

3. Was it error for the jury to have been present when material producible under 18 U.S.C. §3500 was marked for identification?

The Constitution and the Statutes

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

Section 371 of Title 18 of the United States Code provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 1503 of Title 18 of the United States Code provides:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1622 of Title 18 of the United States Code provides:

> "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Statement

Petitioner Pacelli was indicted for substantive offenses of obstructing justice jointly with one Schawartzberg, and conspiring so to do along with one Kahn as well as Schawartzberg. The thrust of the Government's proof was that there were endeavors to tamper with the testimony of an unsavory character named Hedges, who in due course was to become a witness against the petitioner Pacelli in a narcotics trial at which he was convicted.*

In August 1962, Hedges agreed to testify against Pacelli and others in connection with a narcotics investigation, but it was not until June of 1964 that he first appeared and testified before a grand jury. The substantive offense of which Pacelli was accused and convicted in this case related to an incident on January 9, 1963, when, according to the Government's proof, Pacelli and Schawartzberg spoke to Patricia Hedges about her husband's testifying. Schawartzberg was the so-called law clerk of the co-defendant Frances Kahn, a woman lawyer who had represented Hedges at a trial in which he (Hedges) had been convicted and received

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* Pacelli is presently petitioning this Court for a writ of certiorari in connection with the affirmance of that case: *Pacelli* v. *United States,* No. 427, October 1966 Term.

a fifteen-year sentence. She continued to see Hedges until a time after his first appearance before a grand jury. Although this was sharply disputed, the tendency of the Government's proof was that she sought to exercise an improper influence on Hedges' decision to testify on behalf of the Government against Pacelli and others. Some of her conversations with Hedges in jail were recorded, with Hedges' knowledge, by Government agents. Schawartzberg and Kahn were acquitted of the substantive offenses charged against them in the indictment but convicted, along with Pacelli, of the conspiracy to obstruct justice. Pacelli was convicted of a substantive offense alleged to have taken place in January 1963 as well as of the conspiracy. He was sentenced to two years on the conspiracy and two years on the substantive count, the sentences to run concurrently with one another.

The facts necessary to Pacelli's contention in this petition are set forth in that part of the petition which deals with those contentions. Beyond that the facts are sufficiently stated in the opinion of the Court of Appeals.

Reasons for Granting the Writ.

1. The Trial Court denied the petitioner Pacelli, who rested at the end of the Government's case, a fair trial and the effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments, by refusing to limit the evidence the jury might consider in determining his guilt to that presented by the Government on its case.

a. *The prejudice and the relief sought.*

At the outset it is necessary to state that this is not simply another instance where a defendant asks for a severance from a prejudicial joinder, though Pacelli was vastly prejudiced by being joined with the co-defendants in the trial. That prejudice flowed from two sources. The first was that the co-defendant Kahn, a woman lawyer, and the co-defendant Schawartzberg, her factotum and "law clerk", who, heedless of the ancient maxim, represented himself, charged that they were the victims of a "conspiracy between the government and the worst elements of society to destroy a lawyer" (22—Opening for Kahn).* Miss Kahn was likened to Clarence Darrow (25) and the lawyers who represented Peter Zenger (24). The support in the record for this position was not over-strong. Miss Kahn did not testify to any unusual animus against her by high government officials or to any radical or unorthodox political or social views, and in her testimony the government was able to develop that insofar as cases arising in the Southern District of New York were concerned, there was one acquittal in a counterfeiting case in 1963 and one reversal on

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* Numbers in parentheses refer to pages of the stenographic record of trial; when followed by the letter "A" numbers refer to pages of the appellants' joint appendix.

the government's confession of error in 1960 (1350-1357). This point was not missed by the prosecutor, and in summation Mr. Martin invited the jury to "Look at that record. If the Government was going to single out a criminal lawyer to frame would it pick on defendant Kahn? I submit that record shows that they would not" (1686; 576A). Pacelli eschewed this line of defense from the moment it was introduced and sought a mistrial and a severance (26-27; 9-10A).

The second source of the prejudice arising from the joint trial was that the Government's case against Pacelli, that is to say, the direct competent evidence against him, was extremely thin. The Government did not show any meetings or connection between Pacelli and Hedges, the witness supposedly being tampered with, and it had no competent proof of a connection between Pacelli and the lawyer Kahn. Hedges did, of course, testify to conversations purportedly had with Kahn, but these were hearsay and not admissible against Pacelli until and unless the jury concluded from evidence directly competent against Pacelli that there was a conspiracy of which he was a member. The sole piece of competent evidence against Pacelli came from Patricia Hedges who testified as to the incident of January 9, 1963, which formed the basis of the substantive count of which Pacelli was convicted. Two federal agents, Manning and Benjamin, were present at that incident, but their testimony merely tended to confirm Mrs. Hedges' account. The thrust of her testimony was that in a meeting arranged by Schwartzberg, at which Schwartzberg was present, Pacelli was introduced as a friend of her husband's and offered her money with which she and her husband might go away

during, and perhaps after, Hedges' then pending appeal. Mrs. Hedges testified:

> "Q. And that your getting this money was not contingent on whether or not Charlie won the appeal, isn't that so? A. Oh, it was. No.
>
> Q. It was not contingent upon that, right? A. No, we could have the money either way.
>
> Q. You could have the money either way? A. Yes.
>
> Q. To go away pending the disposition of the appeal? A. That's right." (1007; 338A)

From this conversation the jury was asked to conclude beyond a reasonable doubt that Pacelli was attempting to alter, suppress and nullify the testimony of Hedges. Not one word was said by Pacelli about testimony and there is nothing in the record to show or indicate that the offer was in any way conditioned on or related to testimony.

Another item of evidence admitted by the Trial Judge only on the conspiracy count related to conversations purportedly had between the previous wife of Hedges, in July of 1962 and Pacelli, concerning bail and inquiring as to who represented Hedges in his then pending appeal (309-311A). These two incidents were the only items of evidence between August of 1962 and September of 1964 which represented competent evidence against Pacelli.

Miss Kahn testified in her own behalf, and while denying any impropriety fleshed out the prosecutor's skeletal proof. She conceded that Hedges told her that he had been offered money to go away but insisted that he had never told her who or where or when such an offer had been made (1332). She testified that she had once done fifty dollars worth of legal work for Pacelli and was taxed on cross examination

with grand jury testimony in which she had sworn that she had represented Pacelli in connection with several different matters (1421-1427).

The Government's principal witness, Charles Hedges, was an unsavory character whose career in crime started at the age of fourteen and whose delicate moral sensibilities, as they existed at the time of the trial, are typified by the following incident. On cross examination Hedges admitted that in 1960 he had helped a friend clean up a motel room in Florida after a murder. He had made a bundle out of the sheets and dumped them into a canal and helped wash a bloody rug; the victim had been hit with a jack handle and then ice-picked, according to the friend. He had not mentioned this when asked about his participation in criminal activities because he didn't think it was criminal, he had just done what he was instructed to do. The Court said: "He wants to know whether you thought that was criminal. Did you?" and Hedges replied "Well, on my part, to be honest, no, I didn't think it was", and gave as his reason that he "didn't do anything" (314). He also had told the Florida police that the reason he had gone to Florida was to do a "safe job" (309-322).

In view of the relative sparsity of the Government's proof and the despicable character of the Government's chief witness, Pacelli took a very different line of defense. He sought to attack the sufficiency legally and factually of the government's proof. He rested at the end of the government's case (1211-1215; 427-431A) and introduced no evidence, and did not examine the co-defendant Kahn when offered an opportunity to do so and simply maintained he had rested (1349; 483A). At the time the defendant Pacelli

rested the Trial Court was urged to instruct the jury not to consider against Pacelli evidence developed on any defense which the co-defendants might put in, on the theory that "he has a right to go to the jury on the Government's case" (1212; 428A). The Court declined to so charge at that time but indicated that it would cover the matter in its charge to the jury (1211-1214; 427-430A); an objection was taken to the Court's failure to so charge the jury (1742; 631-632A) and reiterated when the jury returned to request additional instructions on the second day of its deliberations (1828-1830; 696-698A).

Pacelli's line of defense was an attack on the sufficiency of the government's case and thus his counsel told the jury in summation:

> "He was the first one to rest. He says the government has produced certain evidence. He says that does not prove his guilt beyond a reasonable doubt, 'I am willing to go to the jury on the basis of that evidence and have you evaluate it.'" (1566)

By asking the Trial Court to permit him to rest and put the Government to its proof, Pacelli sought to avoid the two unfair advantages which the Government so frequently seeks to reap in multi-party conspiracy cases. The first is that as far as the effective assistance of counsel goes, defendants in a multi-party trial are drawn down to the lowest common denominator of judgment, taste and style, and certainly deprived of the effective assistance of counsel in shaping their defense. Not only must defense counsel meet the Government onslaught, but must also endeavor to survive the efforts of the co-defendants. This case is a perfect illustration of that principle in action. While it apparently

seemed appealing to the co-defendants to accuse the United States Attorney of being in league with an underworld character like Hedges in a venture to persecute a lawyer, it hardly requires a Lord Erskine to recognize that such a defense had the effect of telling the jury that if they acquitted the defendants they were implicitly finding the attorneys for the Government guilty of the gravest sort of misconduct.

Similarly, by joining defendants in a conspiracy and conspiratorial type of prosecution, the Government was able to sit back and wait for the defendant Kahn in her efforts to extricate herself to testify in a way that strengthened the Government's case against Pacelli.

The modest relief that Pacelli sought was simply to be permitted to rest at the end of the Government's case and go to the jury on that case. After the end of the Government's case Pacelli examined no further witnesses.

b. *The granting of the novel relief sought here would ameliorate the unfairness of multi-party trials without impairing the administration of justice.*

Neither counsel for the Government in the Court of Appeals, nor counsel for Pacelli, was able to cite any case decided in a Court of the United States which passed on the relief sought here. The Court of Appeals held that the damaging effect of the co-defendant Kahn's testimony did not justify a *severance*, citing *United States* v. *Houlihan*, 332 F. 2d 8, 15 (2d Cir.), *cert. denied* sub nom. *Legere* v. *United States*, 379 U.S. 828, 859 (1964), and concluded that the danger of prejudice to Pacelli from the fact that " . . . the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made

by Schawartzberg and Kahn . . . was far too remote to require severance." We concede here, as we did in the Court of Appeals (page 23, Brief for Appellant Pacelli in the Court below) that there are strong arguments against the granting of a severance. Those arguments do not, in fact, turn on the "remoteness" of possible prejudice. They are practical arguments that have to do with the realities of the administration of justice and the difficulties of multiple and successive trials. The argument against severance was succinctly put by Learned Hand thusly:

> " . . . (T)here is no practical alternative except, as we have said, to give them immunity. The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none. Indeed, if we were to accept the argument, there would really be an end of trials for jointly conceived, or jointly executed, crimes, except in cases of the simplest character." *United States* v. *Cohen*, 145 F. 2d 82, 95-96 (2d Cir., 1944), *cert. den.* 323 U.S. 799.

However, there is an alternative to joint trial or no trial for a defendant in a multi-party case. The defendant should have the right, by resting at the end of the Government's case, to have the jury given limiting instructions requiring them to consider only the Government's case in judging his guilt. The defendant already has such a right in terms of the legal sufficiency of the case. As Judge Wright wrote, concurring, in *Cephus* v. *United States*, 324 F. 2d 893 (D.C. Cir. 1963), at 898:

> "The fact that exculpatory evidence offered by his co-defendant implicated appellant in the crime cannot deprive appellant of his rights under Rule 29(a).

> Nor can appellant's efforts, in introducing evidence in his own behalf to offset his co-defendant's evidence, trigger the invocation of the waiver doctrine. Whatever continued validity that archaic doctrine may have, it certainly has no application to the facts of this case. Indeed, a simple reading of Rule 29(a) indicates that the waiver doctrine is without validity in any case. A defendant cannot be boxed out of his Rule 29(a) rights by forcing him to go to trial with a co-defendant, or by waiting hopefully for him to convict himself."

It would seem that it makes even less sense to permit a defendant to be boxed out of his rights under the Fifth and Sixth amendments to have the Government prove his guilt beyond a reasonable doubt and to have the assistance of counsel by permitting the Government to join the defendants and hope that one or another co-defendant will embark upon a perilous or antagonistic line of defense or take the stand and inculpate someone standing in the dock alongside him. Certainly this is true where so simple and nondisruptive a method of relief is available as limiting instructions. The importance of limiting instructions is evident from the language of this Court in *Delli Paoli v. United States*, 352 U.S. 232 (1957) at 242:

> "Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The Court of Appeals, without citation or analysis, dismissed Pacelli's contention that the Trial Court erred in refusing to give limiting instructions:

> "We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants."

Perhaps the Court's summary treatment of this question reflects the judicial attitude expressed in *United States* v. *Kelly*, 349 F. 2d 720 (2d Cir., 1965) at 766:

> "Doubtless prosecutors always hope co-defendants will turn on one another and thus enhance the chances that all will be found guilty. This may be exasperating to counsel, but it is not unlikely that, when all is said and done, the ends of justice will be attained."

While conspiracy and multi-party trials may, for the reasons suggested in *Kelly*, be exasperating to counsel, they must be something more than exasperating to anyone who views a Federal criminal trial as something other than an effort to gather a group of persons whom the Government believes, but cannot prove, guilty and put them to trial in the hope that they will convict one another.

This Court is by now undoubtedly innured to the citation by counsel in Federal conspiracy cases of *Krulewitch* v. *United States*, 336 U.S. 440 (1949) and the warnings contained in Mr. Justice Jackson's concurring opinion (*Id.* 445-446) as to the threat that conspiracy prosecutions pose to the fair administration of justice. In the light of reason

and the experience of the years that have intervened since *Krulewitch,* we submit that the holding we seek here would deprive prosecutors of unfair and improper advantages which have made conspiracy trials unduly popular, without impairing the even-handed and expeditious administration of criminal justice. Giving each defendant in a multi-party trial who elects to rest at the end of the Government's case the right, by requesting limiting instructions, to go to the jury on the Government's case would have a salutary effect on the fairness of trials of this sort. It would be prophylactic. The darling of the prosecutor's nursery, observed by Mr. Justice Jackson in 1949, has grown up to be a doxy.

2. The placing of electronic recording equipment on a Government witness so as to record conversations with a co-defendant violated petitioner's rights.

3. It was error for the jury to have been present when material producible under 18 U.S.C § 3500 was marked for identification.

We understand that the co-appellants in the Court of Appeals who are perfecting petitions for writs of certiorari are raising *inter alia* as grounds the points which we have indicated in our second and third questions and our second and third reasons for granting the writ. To spare this Court needless repetition we adopt their application for certiorari in regard to these two points.

One further matter requires brief discussion in connection with the recording of the conversations between Hedges and Kahn. Because he ruled adversely to the defendants prior to trial, Judge McClean explicitly left the question of the standing of Pacelli and Schawartzberg to object to the use of the recordings of the conversations between Kahn

and Hedges undecided. We respectfully submit that should this Court grant certiorari on the question of the recorded conversations, it should hear full argument addressed to the question of standing. At this point we content ourselves with suggesting that unlike search and seizures, the use of electronic recordings of any sort has important consequences for parties other than those directly subject to the recording and that this is particularly true in a conspiracy case of this sort.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES TO PETITION

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1965.

(Argued June 3, 1966 Decided July 18, 1966.)

Docket No. 30430

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCES KAHN, VINCENT PACELLI and ISRAEL SCHAWARTZBERG,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction for endeavoring to obstruct justice and conspiracy to obstruct justice, 18 U. S. C. §§1503, 371, entered in the District Court for the Southern District of New Yorn after trial before Edward C. McLean, *Judge,* and a jury. Affirmed.

JEROME LEWIS, Brooklyn, N. Y. (Frances Kahn, Bronx, N. Y., and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant Frances Kahn.*

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., with him on the brief), *for the appellant Pacelli.*

ISRAEL SCHAWARTZBERG, Bronx, N. Y., *pro se.*

JOHN S. MARTIN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and John E. Sprizzo, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Frances Kahn, Vincent Pacelli, and Israel Schawartzberg appeal from judgments of conviction. All three were convicted of conspiracy to obstruct justice and suborn perjury, in violation of 18 U. S. C. §§371, 1503, and 1622. In addition, Pacelli was convicted of obstructing justice in violation of 18 U. S. C. §1503. Each appellant was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count.

1. *The Sufficiency of the Evidence.*

The Government maintained at trial, and the jury found, that the appellants worked together in an effort to prevent one Charles Hedges from testifying against appellant Pacelli. On appeal, each of the appellants challenges the sufficiency of the evidence as to the counts on which he or she was convicted.

Viewing the evidence in the light most favorable to the Government, *United States* v. *Kahaner,* 317 F. 2d 459, 467 (2d Cir.), *cert. denied,* 375 U. S. 836 (1963), the following story emerges from the testimony at trial. Hedges was convicted for violation of the federal narcotics laws and was sentenced to fifteen years' imprisonment by the District Court of the District of Connecticut in March 1961. In July 1962, Hedges agreed to testify against certain of the people with whom he had been associated in the narcotics trade. His testimony before a grand jury in the Southern District of New York in June and September 1964 contributed to an indictment against Pacelli and others for conspiracy to violate the federal narcotics laws. Hedges testified at the trial on that indictment in May 1965.

Towards the end of July 1962, Pacelli visited Joan Hedges, Hedges' first wife; gave her $500; found out that Hedges needed $5,000 to get out on bail pending appeal; and learned that his lawyer was Frances Kahn. On July 30, 1962, Schawartzberg, Kahn's legal secretary, met with Hedges' fiancee and future wife, Patricia Curtin; gave her $3,000 of $5,000 he apparently had received; and instructed her to use the money to open a savings account to be used as collateral for Hedges' bail.

On January 9, 1963, Schawartzberg introduced Pacelli to Hedges' second wife Patricia, saying that Pacelli had put up the money for Hedges' bail. Pacelli told Patricia that he would give Hedges and her as much money as they needed to go away pending the appeal and even afterwards. Schawartzberg told Patricia that "he [apparently meaning Pacelli] just doesn't want Charlie to do anything against him."

On January 14, 1963, Schawartzberg called Patricia, asked if Charlie was still Pacelli's friend, and said that Kahn was going to visit Charlie. Two days later, Kahn visited Hedges and asked what he intended to do. When he said, "Tell them to run because I'm through with them," she said: "I don't think that's like you. You wouldn't do anything like that." She made similar statements during her repeated later visits to Hedges whenever he indicated that he was thinking of "talking."

On September 22, 1963, Kahn told Hedges that if he didn't testify, Vince would lend him $25,000, which he wouldn't have to repay if he were indicted again, and that he would have complete protection.

In July and September 1964, Kahn told Hedges that if he were called before the grand jury he should push back the dates of his dealings in narcotics so that prosecution would be barred by the statute of limitations. In her July visit, she also told Hedges that if he did testify he should make sure that the Government guaranteed his wife's protection, since she was afraid for him and his wife; and she suggested that if he acted crazy he wouldn't have to testify. In an August 1964 visit, apparently referring to Hedges' intention to testify, Kahn said: "I hate to see you destroy yourself, and that's what you'll do."

The evidence just summarized was ample to take to the jury the question of appellants' guilt on the conspiracy count. We find no force in the contentions of Kahn and Schawartzberg that their acquittals on the substantive counts demonstrate the insufficiency of the evidence against them on the conspiracy count. The acquittals at most indicate inconsistency in the jury's verdict, which is not by

itself grounds for reversal, *Dunn* v. *United States*, 284 U. S. 390 (1932); see *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960). The inconsistency here was not irrational, since the jury could have believed that Schawartzberg and Kahn, while working together with Pacelli, did so at his bidding and were correspondingly less culpable.

The evidence as to Pacelli's membership in the conspiracy was also sufficient to go to the jury. The jury properly could have found not only that Pacelli was working with Schawartzberg and with Schawartzberg's employer Kahn in an effort to keep Hedges quiet, but also that their joint efforts lasted up until the time Hedges began to testify before the grand jury. See *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir.), *cert. denied*, 316 U. S. 678 (1942).

Pacelli contends that the evidence against him on the substantive count was insufficient as a matter of law, since at the time involved in that count—January 9, 1963—there was no pending proceeding in which Hedges was to testify. See *Pettibone* v. *United States*, 148 U. S. 197, 207 (1893); *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). We need decide neither the correctness of *Scoratow* nor its application to a case in which the potential witness has actually agreed to testify. Pacelli's sentence on the substantive count was concurrent and of the same length as his sentence on the conspiracy count, and we conclude, for reasons set out elsewhere in this opinion, that his conviction on the conspiracy count should be affirmed. See *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Benjamin*, 328 F. 2d 854, 856 (2d Cir.), *cert. den.* sub nom. *Howard* v. *United States*, 377 U. S. 953 (1964).

We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants.

2. *The Motions for Severance.*

Each of the appellants attack the denial by the trial court of his or her motion for a severance. Pacelli contends that the trial court should have severed the case as to him because he was prejudiced by the testimony of Kahn during the presentation of her defense, which tended to establish a link between Kahn and Pacelli which had been supplied only inferentially in the Government's case. This did not by itself require the trial court to sever Pacelli's case, see *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2d Cir.), *cert. denied.* sub nom. *Legere* v. *United States,* 379 U. S. 828, 859 (1964), particularly since Kahn's testimony in no way indicated that she worked together with Pacelli in attempting to keep Hedges quiet. Pacelli also maintains that he was prejudiced by his codefendants' arguments that the whole case was an unfair attempt by the Government to destroy Kahn as a lawyer, since the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made by Schawartzberg and Kahn. We believe that the danger of prejudice to Pacelli from his

codefendants' position was far too remote to require severance. The jury could presumably keep separate the positions of the three defendants in this relatively short and simple trial. Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 930-31 (2d Cir.), *cert. denied* sub nom. *Ormento* v. *United States*, 375 U. S. 940 (1963).

Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to call witnesses. The position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged, *Johnson* v. *United States*, 318 U. S. 189, 195 (1943); McCormick, Evidence §131 (1954), whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous, *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), *cert. denied*, 374 U. S. 829 (1963); *Olmstead* v. *United States*, 19 F. 2d 842, 847-48 (9th Cir. 1927), *aff'd*, 277 U. S. 438 (1928), at least in the absence of anything in this record indicating that the codefendant would have given exculpatory evidence, see *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965).

3. *The Charge on Conspiracy.*

The trial court's instructions as to the law of conspiracy, attacked by Pacelli as not adequately focusing the attention of the jury on the questions whether the evidence estab-

lished one conspiracy or many and whether Pacelli was a knowing member, were entirely proper in the context of this case. The court not only instructed the jury that it had to find that the conspiracy existed as charged in the indictment, but also that the defendants knowingly associated themselves with the conspiracy and that each defendant's association with the conspiracy had to be determined only from evidence as to that defendant's own acts, declarations, and conduct. See *United States* v. *Stromberg,* 268 F. 2d 256, 265-65 & n. 10 (2d Cir.), *cert. denied,* 361 U. S. 863, 868 (1959).

4. *The Conduct of the Prosecution.*

At several of the interviews between Kahn and Hedges while the latter was in prison, electronic equipment was placed with the consent of Hedges both on Hedges and around the room in an effort to record the conversations between the two. The resulting tapes were not particularly intelligible, since Kahn carried a portable radio with her on her visits and turned it up whenever she had anything important to say.

Appellants' pre-trial motions to suppress these tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. Kahn and Schawartzberg contend that the prosecutor hinted at the existence of the tapes in his summation, when, after Kahn's counsel had pointed to Kahn's candor in testifying about the offer of money to Hedges, the prosecutor said, "Do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise?" This brief remark, improper

though it was, did no more than suggest the possession of further proof by the Government, if indeed it did that much; Hedges had testified for the Government as to the offer. Even if the tapes were unconstitutionally obtained, this fleeting reference did not amount to the use at trial of unconstitutionally obtained evidence. Cf. *United States* v. *Guerra*, 334 F. 2d 138 (2d Cir.), *cert. denied*, 379 U. S. 936 (1964).

Nor should the trial court have dismissed the indictment because of the possibility that the tapes might have been played before the grand jury. Even if the tapes were illegally obtained, their admission before the grand jury would not justify the relief requested unless the defense was able to show that the indictment rested solely on incompetent evidence. See *Costello* v. *United States*, 350 U. S. 359 (1956); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Cochran* v. *United States*, 310 F. 2d 585, 590 (8th Cir. 1962). Here, both Hedges and his wife Patricia testified before the grand jury, and their testimony was both competent and ample grounds for the indictment.

Kahn maintains that the conduct of Hedges amounted to entrapment. She requested no charge on entrapment at trial, and was entitled to none. There is no testimony in the record which suggests that Hedges ever asked for money for his wife or himself in return for not testifying.

Kahn and Schawartzberg contend that the use of Hedges, if not entrapment, was so offensive that this court should reverse the convictions resulting from this use in the exercise of its supervisory power over the machinery of federal

justice and law enforcement. Appellants find it particularly heinous that Hedges never told Kahn that he was no longer her client, and seek to show that the Government somehow abused the attorney-client privilege. However, the attorney-client privilege is not involved. That privilege is the client's, not the attorney's; and in any case, it does not extend to advice from the attorney in furtherance of a crime. McCormick, Evidence §96, §99 (1954). Nor is the use of Hedges in some other fashion offensive. As we have seen, he did not solicit bribes from Kahn; she came to him with offers of bribes and with veiled threats that he better not testify.

Kahn also urges upon us as grounds for reversal the alleged misconduct of an Assistant United States Attorney for the Southern District of New York. According to Kahn, Hedges admitted to this Assistant United States Attorney that he had been involved in the narcotics activity for which he had been convicted in Connecticut. This admission was made while Hedges was appealing from his Connecticut conviction, partly on the grounds of the insufficiency of the evidence against him. We fail to see how Hedges' right to challenge the sufficiency of the evidence against him was affected by his post-trial admission of guilt; or what the receipt of the post-trial admission, which apparently did not exculpate any of the codefendants, obliged the Assistant United States Attorney to do. In any event, the matter is entirely irrelevant to the present appeal.

5. Rulings During the Course of Trial.

Appellants contend that a variety of the rulings of the trial court were erroneous. Kahn argues that the attorney-client privilege was improperly invoked to prevent her from describing the legitimate objectives of her many visits to Hedges in prison, and that this restriction made it seem that she visited Hedges only for illicit purposes; suborning perjury or trying to prevent him from testifying. However, as the Government makes clear in its brief, Kahn herself suggested that she should not go into the nature of the topics discussed with Hedges. She hardly can object to a ruling she invited and did not object to when made.

Kahn and Schwartzberg contend that Hedges should not have been allowed to invoke his privilege against self-incrimination when questioned about the details of crimes, the commission of which he already had admitted. We do not think it was reversible error to prevent defense exploration of the details of the crimes on cross-examination. Hedges may well have waived his privilege against self-incrimination by admitting commission of the crimes, but Kahn and Schawartzberg had already gotten most of the benefit they were going to get out of the crimes by virtue of Hedges' admission. His admission at once undermined his own credibility and indicated a legitimate lawyer-client reason for the many visits by Kahn to Hedges in prison. Exploration of the details of the crimes would have been largely superfluous. See *United States* v. *Irwin*, 354 F. 2d 192, 198 (2d Cir. 1965); *United States* v. *Owens*, 263 F. 2d 720, 722 (2d Cir. 1959).

Appellants also contend that the court should not have permitted the jury to be present when the Jencks Act material was being marked for identification. Perhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, see *Johnson* v. *United States,* 347 F. 2d 803, 806 (D. C. Cir. 1965); but this taken by itself is not sufficient grounds for reversal. See *Roberson* v. *United States,* 282 F. 2d 648, 650-51 (6th Cir.), *cert. denied,* 364 U. S. 879 (1960).

6. *Conclusion.*

We have carefully considered each of the remaining assignments of error put forward by the appellants, and find them devoid of merit. The convictions are accordingly affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Frances Kahn, and Israel Schwartzberg, and Vincent Pacelli,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

Opinion of United States District Court

McCLEAN, District Judge.

Defendants have been indicted for endeavoring to influence a government witness and for obstructing the due administration of justice, in violation of 18 U.S.C. § 1503, and for conspiracy to do so, and to suborn perjury, in violation of 18 U.S.C. § 371. Defendants now move, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, to suppress certain recordings of conversations between defendant Kahn and the witness, Charles Hedges, and "all evidence pertinent thereto." I held a hearing and took testimony on this motion. The facts developed at this hearing are as follows:

In January 1961, Hedges was indicted in the United States District Court for the District of Connecticut for violation of the narcotics laws. He was tried from February 15 to March 21, 1961. He was convicted and sentenced to imprisonment for fifteen years and to pay a fine of $10,000. Defendant Kahn, an attorney, represented Hedges in that trial.

The District Court in Connecticut fixed Hedges' bail pending appeal in the sum of $50,000. He was unable to make that bail and consequently he was imprisoned in the Federal Penitentiary in Lewisburg, Pa. In late June 1962 he was transferred from Lewisburg to the Federal House of Detention on West Street, New York City. At that time he informed the United States Attorney of this district that he desired to "cooperate" with the government. Just

what form this "cooperation" took and what information he gave to the United States Attorney at that time was not brought out at the hearing.

In July 1962 Hedges was transferred from West Street to the Westchester County Jail in Valhalla, New York, a New York State penal institution. He was there as a federal prisoner pursuant to some arrangement between the federal and the state authorities. He remained there approximately one month. In July 1962 defendant Kahn, as Hedges' attorney and at his request, moved for a reduction of bail. The District Court in Connecticut reduced it to $25,000. Hedges posted that bail and was thereupon released from prison in August 1962.

On December 11, 1962, Hedges was involved in a shooting incident, the details of which were not explained. Apparently he exchanged shots with somebody and as a result of this gunplay, he was wounded. He was sent for treatment to Kings County Hospital for a time and in January 1963, after he had recovered from his wound, he was sent back to Westchester County Jail. A state charge of violation of the Sullivan law was filed against him. This charge has never been disposed of.

Hedges took an appeal from his narcotics conviction. Defendant Kahn prosecuted the appeal as his attorney. The Court of Appeals affirmed his conviction in March 1963.

He did not apply for certiorari. Instead he applied to the District Court in Connecticut for a reduction of sentence. Defendant Kahn made this motion on his behalf. In May 1963, the District Court in Connecticut reduced his sentence

from fifteen to five years. Hedges served the remainder of this sentence in the Westchester County Jail. He was released in May 1965.

Defendant Kahn visited Hedges frequently at the Westchester County Jail. The record shows that she made 37 visits to him there between January 1963 and May 1965. At least eleven of these visits were made in the year 1964. The visitors' slips and other records maintained by the prison authorities with respect to visitors, describe defendant Kahn as Hedges' "attorney."

The interviews between defendant Kahn and Hedges usually took place in the sheriff's office. This was the customary place for interviews between prisoners and female attorneys who, according to the deputy warden, are not allowed to go "back on the floor."

On September 20, 1963, a judge of the County Court, Westchester County, made an order, pursuant to the New York statute (Code of Criminal Procedure, § 813-a) upon the application of the Acting District Attorney of Westchester County, authorizing the Acting District Attorney "or his duly authorized agents," to eavesdrop upon the personal conversations of Charles Hedges and to "install such electronic equipment as may be necessary to assure the eavesdropping, overhearing and recording of the said conversations." The order provided that it should be effective until November 20, 1963. As far as appears, no subsequent order was obtained.

Also on September 20, 1963, Hedges made an affidavit in which he swore that defendant Kahn had made certain

statements to him, including a statement that defendant Pacelli had said that he would take care of all the expenses of Hedges' family and that he would see that Hedges had nothing to worry about if Hedges did not testify. Hedges further said in his affidavit:

> "That I wish to cooperate with the Federal authorities to assist them in obtaining evidence against the suspects in this case. I make this offer for that purpose and consent that any and all future conversations between myself and Mrs. Kahn may be intercepted and put to use by the Federal Government for whatever purpose it deems fit."

This affidavit was delivered to the Acting District Attorney of Westchester County but it was not made part of the application for the eavesdropping order.

In October 1963, a federal narcotics agent installed electronic eavesdropping equipment in the Westchester County Jail. He concealed a transmitter under a desk in the sheriff's office and a receiver, together with recording equipment, in a nearby room. A similar transmitter was given to Hedges, who affixed it to his person. An interview took place between defendant Kahn and Hedges in the sheriff's office on October 6, 1963. Federal agents eavesdropped upon his conversation by use of the electronic equipment and made a record of it.* The eavesdropping equipment was removed by the federal agents at the end of the day on October 6.

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* Apparently shortly prior to October 6, 1963, an effort was made by federal agents to overhear and record a conversation between defendant Kahn and Hedges on this equipment. Because of mechanical difficulties, the record "did not come out." It was completely unintelligible.

In September 1964, federal agents again installed eavesdropping equipment in the sheriff's office. Two conversations between defendant Kahn and Hedges were overheard and recorded by federal agents, one on September 27, 1964, and the other on October 13, 1964. Shortly thereafter the equipment was removed.

The federal agent in charge of this investigation testified that federal officers did no eavesdropping on conversations between defendant Kahn and Hedges in the sheriff's office except on the four occasions when recordings were made.

In December 1963 a state officer, a deputy sheriff, installed electronic eavesdropping equipment in another room in the jail, the assistant warden's office. Apparently this was done on the expectation that conversations between defendant Kahn and Hedges would take place in that room. However, these expectations were not fulfilled. The deputy sheriff listened in on this equipment some five or six times in December 1963. On some of these occasions a federal officer also listened with him. They heard no conversations between defendant Kahn and Hedges. Apparently defendant Kahn and Hedges were not even there. No recordings were made because there was nothing to record. These activities are therefore irrelevant to this motion.

The government has produced the four recordings made by federal agents as heretofore described. I permitted attorneys for all defendants and also defendant Kahn and defendant Schawartzberg (who at his own insistence has no attorney in this action) to hear these recordings. I have listened to them as well. The government has represented to

this court that it has produced all recordings of conversations between defendant Kahn and Hedges in its possession or of which it has knowledge. I rely upon that representation. I find that there was no eavesdropping upon the electronic equipment installed by federal agents except that which was recorded upon the four records which have been produced. We are concerned on this motion, therefore, only with those four records.

The records are largely unintelligible because of the interference of "background noises." Some words can be caught here and there. Although invited by the court to do so, the government has not stated what use it proposes to make of these records at the forthcoming trial. It takes the position that that question is irrelevant on the present motion. In this I believe that the government is correct. The question now before me is not what the recordings prove, if anything, but whether they should be suppressed completely on the ground that the eavesdropping and the recording infringed defendants' constitutional rights.

Before turning to that subject, I note the explanation for the mechanical difficulties in the recording. The background noise was made by a transistor radio. Defendant Kahn testified that she brought this radio with her and played it during her interviews with Hedges because it was "notorious" that eavesdropping went on at the Westchester County Jail. The fact that recordings were made of her conversations obviously came as no surprise to her.

Considerable testimony and argument have been devoted to the question of whether, at the time the conversations were recorded, the relationship of attorney and client

existed between defendant Kahn and Hedges. There is no doubt that that relationship existed at least until May 1963. There is evidence that thereafter Hedges sought and obtained defendant Kahn's legal advice about the Sullivan Law charge and about an application which Hedges was considering, but which, as it turned out, he never made, for an order of this court directing that he be returned to Lewisburg. Hedges testified that although he did not regard defendant Kahn as his attorney after his conviction was affirmed and his sentence was reduced, he never told her so. He did not retain any other attorney. As previously noted, the prison authorities treated defendant Kahn as Hedges' attorney throughout. Defendant Kahn could reasonably have believed that she continued to be his attorney, even after her active services with respect to the criminal prosecution were concluded.

For the purposes of this motion, I shall assume that the attorney-client relationship existed at the relevant times, i. e., October 1963 and September and October 1964. I shall consider the constitutional question raised by this motion in the light of that assumption.

Defendants have asserted rights under a variety of constitutional provisions. The New York Civil Liberties Union has also mentioned several in a brief filed amicus curiae in support of the motion. Between them, defendants and the amicus curiae claim that the eavesdropping and recording violated no less than six different amendments, i. e., the First, Fourth, Fifth, Sixth, Ninth and Fourteenth. Some of these contentions are clearly without merit.

Since we are here concerned with evidence obtained by federal officers for use in a federal criminal prosecution, the Fourteenth Amendment obviously has no application. The right of a defendant in a criminal prosecution "to have the Assistance of Counsel for his defense," guaranteed by the Sixth Amendment, is not involved. This case is not like Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) where the eavesdropping of defendant's conversations occurred after defendant had been indicted and had retained counsel.

The First and Ninth Amendments, in my opinion, have at most only a tangential bearing upon the case. In *Griswold* v. *State of Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), relied upon by defendants here, a state statute which forbade the use of contraceptives was held to violate the Fourteenth Amendment. The Court discussed "the right of privacy" enjoyed by married couples. In the course of its opinion it mentioned the First Amendment and said of it that it "has a penumbra where privacy is protected from governmental intrusion." (381 U.S. at 483, 85 S. Ct. at 1681) The Court also quoted the Ninth Amendment which provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Court implied that the "right of privacy" is one of these rights retained by the people.

To my mind, it is not necessary to strain the language of the First or Ninth Amendments in order to raise the

problem presented in this case. It is squarely raised by the Fourth Amendment which provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

So much of the Fifth Amendment as provides that no person" shall be compelled in any criminal case to be a witness against himself" is also involved, in the sense that where unreasonable search and seizure is concerned, "the Fourth and Fifth Amendments run almost into each other." Boyd v. United States, 116 U.S. 616 at 630, 6 S. Ct. 524 at 532, 29 L. Ed. 746 (1886) cited in Lopez v. United States, 373 U.S. 427 at 455-456, 82 S. Ct. 1381 at 1396-1397, 10 L. Ed. 2d 462 (1963) (dissenting opinion). Philosophically speaking, obtaining evidence from a defendant by an unreasonable search and seizure may be said to violate his privilege against self-incrimination, i. e., his right to protect and retain the incriminating evidence which was unreasonably seized. But the fundamental question still is: Was the search and seizure unreasonable?

In considering the authorities which bear upon this question, a proper starting point is On Lee v. United States, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). In that case a government undercover agent who was a friend of defendant, engaged defendant in conversation in defendant's place of business, which was also his home. The agent was "wired for sound," i. e., he had an electronic transmitter concealed upon his person. Defendant made incriminating admissions in the course of the conversation. They were transmitted by the electronic device to another government

agent who was stationed outside the building with a receiving apparatus. This latter agent testified at the trial to the conversations. Defendant's conviction was affirmed. The Court held that there was no unreasonable search and seizure.

In recent years the attitude of the Supreme Court has changed markedly from that expressed in *On Lee*, where the Court said (343 U.S. at 754, 72 S. Ct. at 972):

> "It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure."

The question has arisen as to whether *On Lee* is still good law. Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963) bears directly on that question. There an Internal Revenue agent, also wired for sound, made a recording by an electronic recording device of conversations which he had had with defendant in the latter's place of business. The Court held that the Fourth Amendment was not violated and that the record was properly admitted. The Court cited *On Lee*. Three justices dissented. The Chief Justice, while concurring with the majority in the result, agreed with the dissenters that *On Lee* was wrongly decided.

No case has been cited to me, and I have found none, which has expressly overruled *On Lee*. I have no doubt that the views of what thus far is a minority of the Supreme Court would condemn the eavesdropping that oc-

curred in this case. But it is the duty of a district judge to follow majority opinions, not dissenting ones. If the law is to be changed, the Supreme Court, not the district court, must change it. If the law as it now stands sanctions what was done here, this court must apply and enforce that law.

There are certain points of difference between *On Lee* and *Lopez* and the present case. The question is whether these differences permit or require a different result. If thy do not, then *On Lee* and *Lopez* require a denial of the present motion.

The first point of difference is that in *On Lee* and *Lopez,* the eavesdropping occurred in defendant's home or place of business. Here it occurred in a jail. This difference weighs in favor of the government. In Lanza v. State of New York, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962), the Supreme Court said, in what concededly was a dictum, that:

> "* * * it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." (370 U.S. at 143, 82 S. Ct. at 1221)

This amounts to saying that a jail is not a constitutionally protected area. Neither counsel nor I have been able to find any other authority on this point. I feel obliged to follow this pronouncement of the Supreme Court, even though it is a dictum.

Moreover, I agree with it. I do not accept defendants' argument that the sheriff's office was really defendant

Kahn's law office, pro tem. It was a room in a jail, which she was permitted to use at the sufferance of the prison authorities.

This also disposes of the second factual difference. In *On Lee* and *Lopez*, the person carrying the listening device gained entrance to defendant's home or place of business with defendant's consent and without trespass. Here defendant Kahn did not consent. If federal officers, without her knowledge, had surreptitiously entered her home or office and had therein concealed an electronic transmitter, this would have been a trespass which, under the rule of the "spike mike" cases, would doubtless have invalidated the search. Cf. Silverman v. United States, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961).

But since the sheriff's office in a jail is not defendant Kahn's home or office, there was no trespass when federal officers, with the consent of the prison authorities, installed a listening device in it.

The third difference is that in neither *On Lee* nor *Lopez* was there any attorney-client relationship between the parties. In *Lanza*, again by way of dictum, the Court said:

> "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here." (370 U.S. at 143-144, 82 S. Ct. at 1221)

Just what the Court meant by this is not entirely clear. It may be noted, however, that in *Lanza*, the eavesdropping

was carried on by third persons without the knowledge of either participant in the conversation. Here one participant, Hedges, the client, was fully aware of it and indeed actively facilitated it. Moreover, for whatever it may be worth, it is apparent that the other participant, defendant Kahn, the attorney, suspected it and took precautions to frustrate it by the use of her radio. Under these circumstances, the mere fact that the conversations were between an attorney and her client does not render unreasonable what would otherwise be a reasonable search and seizure. Benson v. People of State of California, 336 F. 2d 791 (9th Cir. 1964), cert. denied, 380 U.S. 951, 85 S. Ct. 1086, 13 L. Ed. 2d 970 (1965).

The principle is well settled that the attorney-client privilege is for the protection of the client. The privilege is his, not the attorney's. Hunt v. Blackburn, 128 U.S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888); Wild v. Payson, 7 F.R.D. 495, 500 (S.D.N.Y. 1946); 8 Wigmore, Evidence (McNaughton Rev. 1961) § 2321 at 629.

Here the client's privilege was not violated. There was no attempt to eavesdrop upon a client while he was disclosing confidential information to his attorney. The whole purpose of the eavesdropping, on the contrary, was to secure, with the active collaboration of the client, evidence of the commission of a crime by the attorney, i.e., the offering of a bribe to a prospective witness, a crime which the government had probable cause to believe would be committed by the attorney. An attorney has no privilege to attempt to bribe his client. The existence of an attorney-client relationship between the parties to these conversa-

tions, therefore, on the facts disclosed by the evidence here, is not a factor which distinguishes this case from *On Lee* or which requires a result on the constitutional question different from that reached in *On Lee*.

It is argued that there is a fourth difference between *On Lee* and *Lopez* and the present case. In *On Lee* and *Lopez*, the eavesdropping did not, as far as appears, violate state law. Defendants claim that here it did. They point to Sections 738 and 739 of the New York Penal Law, McKinney's Consol. Laws, c. 40, and to Section 813-a of the New York Code of Criminal Procedure.

Section 738(2) provides that a person "not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion * * * without the consent of a party to such conversation or discussion" shall be guilty of a felony.

Section 739 provides that eavesdropping pursuant to an ex parte order granted pursuant to Section 813-a of the Code of Criminal Procedure, shall be exempt from the provisions of Section 738.

It is true as far as the evidence discloses, there was no state court order which authorized anyone to eavesdrop on the conversations in September and October 1964. Moreover, the order of September 20, 1963, issued under Section 813-a, did not purport to authorize federal officers to eavesdrop, unless the federal officers may be said to be the "duly authorized agents" of the Acting District Attorney of Westchester County, who was the person empowered by the order to eavesdrop at that time.

The short answer to defendants' contentions is that there was no eavesdropping here at all, within the meaning of Section 738 of the Penal Law, because one of the parties to the conversations consented. People v. Velella, 200 N.Y.S. 2d 966 (Gen. Sess. N.Y. Co. 1960).

Furthermore, the Court of Appeals for the Second Circuit has held that, in a case in which, as far as one can tell from the opinion, neither party to the conversation consented, "the New York statutes" (meaning apparently both the Penal Law and the Code of Criminal Procedure) do not apply to federal law enforcement officers. United States v. Pardo-Bolland, 348 F. 2d 316 (2d Cir. 1965), cert. denied, 382 U.S. 944, 86 S. Ct. 388, 15 L. Ed. 2d 353 (1965). See also United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).

Hence, the federal officers did not violate New York law in this case.

I conclude, therefore, that defendants' constitutional rights have not been violated by the overhearing and recording of the conversation of defendant Kahn and Hedges. In view of this conclusion, it is unnecessary to consider whether or not it is only the defendant Kahn, the only defendant whose conversations were overheard, who, in any event, has any standing to complain.

In thus deciding the constitutional question in favor of the government, I express no opinion as to whether the records of these conversations have sufficient probative force to justify their admissibility. I will pass upon that question if and when they are offered.

Motion denied.

So ordered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 593

FRANCES KAHN,

Petitioner;

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1966

No. ——

FRANCES KAHN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause on July 18th, 1966.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, is not reported to date, and is printed as Appendix A, *infra.*

The opinion of the Trial Court (McLean, *J.*) denying petitioner's pre-trial motion to suppress eavesdrop recordings by federal officers of conversations between petitioner-attorney and her client in the Westchester County Jail was denied, and is reported at 251 F. Supp. 702 (SDNY 1966), and is printed in the Supplemental Appendix of petitioner which accompanied petitioner's brief before the Court of Appeals for the Second Circuit. The said opinion denying

petitioner's motion to suppress the eavesdrop recordings is also printed in co-petitioner Pacelli's petition for certiorari as "Appendix C", Docket Number 557, October Term, 1966. An opinion on petitioner's pre-trial motions is printed in petitioner's Supplemental Appendix to the Court of Appeals (Tyler, *J.*).

Jurisdiction

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on July 18th, 1966. A timely Petition for Rehearing *En Banc* (Appendix C, *infra*) was denied on August 26th, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether eavesdrop evidence obtained by the Government which was used to make its case, by means of surreptitiously and deceptively utilizing an informer in the guise of a client during petitioner's attorney-client conferences in the counsel room of the Westchester County Jail, so violates petitioner's rights under the Fourth, Fifth, Sixth and Ninth Amendments?

2. Whether the Government's intrusion in their attorney-client conferences prior to arrest, and the client was the Government's principal witness, and the use of his testimony thus obtained, constitutes a violation of the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States?

3. Whether *Olmstead* v. *United States,* 277 U. S. 455, *On Lee* v. *United States,* 343 U. S. 747, *Lopez* v. *United States,* 373 U. S. 427, and *Lanza* v. *New York,* 370 U. S. 139, should

now be overruled or should this Court alternatively exercise its supervisory powers over criminal justice?

4. Whether a conviction can be sustained where the most telling evidence against the petitioner consisted of the recording of her conversation with an informer, not known by the petitioner to be such, which was obtained by means of a device concealed on the client-informer, who was sent with such equipment to the counsel room by the United States in order to record his conversations with the petitioner?

5. Whether obtaining the recording of a conversation by a concealed device carried on the person without the knowledge of the individual to whom the carrier of the device is talking constitutes an unreasonable search and seizure in violation of the Fourth Amendment and in violation of petitioner's rights under the Fifth, Sixth and Ninth Amendments?

6. Was petitioner deprived of a fair trial in violation of the Fifth Amendment when the Trial Court allowed the Government's key witness-client to testify against petitioner-attorney and then permitted the Government witness-client to claim Fifth Amendment privilege against self-incrimination simultaneously sealing the lips of petitioner-attorney and curtailing her direct testimony, thereby precluding petitioner from adequately presenting her defense?

7. Was petitioner deprived of a fair trial by action of Government prosecutor in itemizing and unduly emphasizing Jencks Act material in presence of jury over petitioner's objection, knowing it would not be admissible in evidence and then alluded that he had other evidence in his closing argument to the jury?

8. Whether a trial conducted, wherein the identical evidence presented to the jury on the substantive counts as the conspiracy, which charges contained in the substantive counts resulted in an acquittal and dismissal, is a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States under the doctrine of *Paar* v. *United States,* 363 U. S. 370 (1960)?

a) The verdict of the jury acquitting petitioner of the substantive counts was inconsistent with the jury's verdict of guilty on the sole conspiracy count;

b) The conviction of petitioner charged with substantive offenses and one count of conspiracy may not be sustained on the theory of conspiracy when the substantive offenses fell due to an acquittal and dismissal.

9. Whether petitioner was deprived of a fair trial by reason of the following and may such conviction be permitted to stand in light of this Court's power of supervision over criminal justice in federal Courts where the following occurred?

a) Such electronic surveillance of petitioner-attorney and her informer-client, through the instigation of the prosecution, with their participation and concurrence, was an intrusion upon the attorney-client relationship, if not the privilege itself;

b) Such surveillance, intrusion, observation, reporting and recordings of the attorney-client conferences violated petitioner's rights under the Fourth, Fifth, Sixth and Ninth Amendments;

c) The client-informer testified he practiced a deception upon petitioner, with the connivance of the

Government, by giving petitioner spurious legal services to be rendered;

d) After the client-informer continuously requested petitioner to perform legal services in his behalf thereby compelling petitioner to return to the Westchester County Jail again and again, the prosecution emphasized the numerous visits of petitioner to the jail *pro tanto* during the entire trial;

e) The client-informer was allowed to invoke the Fifth Amendment to crimes, one of which was beyond the statute of limitations, and when petitioner sought to explain her many visits to the client at the jail she was stopped from doing so when the Trial Court ruled that petitioner's lips were to be sealed due to her client's invocation of the self-incrimination privilege;

f) The prosecution alluded to other evidence, not in evidence, in his closing argument to the jury;

g) The Trial Court omitted a necessary element, to wit: subornation of perjury, in the Court's charge to the jury. The Government failed to prove a conspiracy to violate the Obstruction of Justice *and* Subornation of Perjury statutes (Title 18, §§1503 and 1622, U. S. C.);

h) Petitioner was erroneously denied a change of venue by the District Court (Tyler, *J.*) as is evident from the Court's opinion, unreported, but printed in petitioner's Supplemental Appendix for the Court of Appeals, p. S17a at S22a thereof;

i) Petitioner was erroneously denied a severance of trial by District Judge Tyler on the pre-trial motions since petitioner desired to call co-petitioner to testify so as to obtain exculpatory evidence in her behalf;

j) Petitioner was prejudiced by the pre-arrest delay and in effect, a speedy trial. *Cf.* Appendices H and I hereto, *infra.*

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States, are printed herein and set forth as Appendix D hereto, *infra.*

Statutes Involved

The statutes involved herein are set forth in Appendix E hereto, *infra.*

Statement

The indictment (11a),* filed November 8, 1965 (1a), named Vincent Pacelli and Israel Schawartzberg as defendants, in addition to petitioner, an attorney. Count One charged a conspiracy to violate §§ 1503 (obstruction of justice) and 1622 (subornation of perjury) of Title 18, U. S. C., from May 1, 1962 to the date of the filing of the indictment, by influencing etc. one Charles Hedges, "who was a witness to be called before a United States Grand Jury and the United States District Court for the Southern District of New York in a proceeding and investigation into the alleged narcotic activities of Vincent Pacelli and others," by procuring Charles Hedges to commit perjury "in the aforesaid proceeding and investigation," and by

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* Numerals in parentheses followed by letter "a" refers to Appellants' Joint Appendix.

influencing, obstructing etc. and endeavoring to influence, obstruct etc. "the due administration of justice in the aforesaid proceeding and investigation." Each of the five overt acts charged in the conspiracy count corresponded specifically to one or another of the respective charges in the substantive counts.

Count Two was dismissed by the Trial Court. Count Two had charged that on or about June 30, 1962 (changed by the Supplemental Bill of Particulars to read July 30, 1962—R. 184)[1] the co-petitioner Schawartzberg endeavored to influence etc. the same Charles Hedges, "who was a witness to be called," etc., i.e., in the same wording as above noted in the conspiracy count, in violation of 18 U. S. C. § 1503.

Count Three charged co-petitioner Schawartzberg alone with obstruction of justice on or about June 30, 1962 (changed to July 30, 1962—as in Count Two), "in that" Schawartzberg endeavored to "alter, suppress and nullify" the testimony of Charles Hedges, "who was a witness to be called," as recited in the two preceding counts. The Jury acquitted Schawartzberg on Count Three (705a). As will appear, the Government's explanation (accepted by the Trial Court) of the seemingly substantial identity between Counts Two and Three was that under Count Three the Government did not have to prove that Charles Hedges at the time in question was "a witness to be called" before an actually impanelled Grand Jury conducting the narcotics investigation referred to.

Count Four, which was dismissed by the Court, charged co-petitioners Pacelli and Schawartzberg in the same words as Count Two, except for the date of the alleged offense, which was stated in this instance as January 9, 1963.

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[1] Papers not included in Appellants' Joint Appendix will be cited under the designation "R" as pages numbers of the Record on Appeal as docketed in the Court of Appeals, Second Circuit.

Count Five charged Pacelli and Schawartzberg, in language similar to that which charged Schawartzberg alone in Count Three, with the offense of obstruction of justice relating to Charles Hedges as having been committed on or about January 9, 1963. The Jury convicted Pacelli but acquitted Schawartzberg on Count Five (706a).

Counts Six and Seven were the substantive counts naming petitioner Kahn alone, and the Jury acquitted her on both of those counts (706a). Count Six is similar to Counts Two and Four, in that it was deemed by the Trial Court to require proof of Charles Hedges being a witness before an actually impanelled and functioning Grand Jury; Count Seven was deemed by the Trial Court similar to Counts Three and Five, i.e., as not requiring proof that Charles Hedges was actually a witness before a Grand Jury. The reason why the Trial Court allowed Count Six (and not only Count Seven) to go to the Jury was that it deemed that as to Count Six the Government had *prima facie* proved the element of Charles Hedges' being a Grand Jury witness, although not during the entire time mentioned in Count Six, which was from on or about January 16, 1963 to on or about September 27, 1964—the Trial Court instructed the jury that they could consider the case against petitioner under Count Six only with respect to the period from June to September 1964, when the Grand Jury witness element was apparently deemed by the Court to have been adequately shown by the Government. Count Seven covered the same time period as Count Six (January 16, 1963 to September 27, 1964), but again, the Trial Court did not deem Count Seven to require proof of the Grand Jury witness element, and accordingly Count Seven was submitted to the Jury without the time-restriction which the Court imposed as to Count Six. In any event, as above-mentioned, the Jury acquitted petitioner on both of these

substantive counts (Six and Seven), and she stands convicted in this case on the Conspiracy Count (Count One).

To recapitulate, the Conspiracy Count (Count One) charged both conspiracy to obstruct justice and conspiracy to suborn perjury. None of the substantive counts charged subornation of perjury. One substantive count for obstruction of justice naming Schawartzberg alone (Count Two), and one naming Schawartzberg and Pacelli (Count Four) were dismissed by the Trial Court because at the times involved Charles Hedges was not yet a Grand Jury witness. On another obstruction count (substantive) charging Schawartzberg alone (Count Three) the Jury acquitted. On another such count charging Schawartzberg and Pacelli (Count Five) the Jury acquitted Schawartzberg and convicted Pacelli. These latter two counts (Three and Five) were allowed to go to the Jury because the Trial Court deemed them not to require proof of Charles Hedges' being a Grand Jury witness. (In effect, then, the Trial Court was allowing these latter counts to go to the Jury on proof of Narcotics Bureau investigative activity as such, without requiring proof of judicial investigation or other judicial proceedings.) The two substantive counts charging obstruction of justice by petitioner (Counts Six and Seven), on both of which she was acquitted, were allowed to go to the Jury because under Count Six the Court deemed there was proof of Charles Hedges' being a Grand Jury witness during a portion of the time period involved in that count, and because under Count Seven the Court deemed that the Grand Jury witness element need not be proved. We would now add also that since Schawartzberg's role in this case was portrayed by the Government as having been that of Miss Kahn's law office employee and agent, the acquittal of both Schawartzberg and petitioner on all of the substantive counts submitted to the Jury, taken together with the fact previously mentioned that all of the overt acts in

the conspiracy count derive from and correspond specifically to the respective subject matters of one or another of the substantive counts, involving Schawartzberg or petitioner, a close examination is required to see whether the verdict was inconsistent.

The constitutional issues as to the extraordinary way in which the Government "made its case" against petitioner Frances Kahn, i.e., by procuring Charles Hedges to feign a confidential relationship of attorney-and-client with petitioner Kahn during conferences in prison counsel room visiting premises under electronic surveillance by Government agents.

Throughout the conferences between Hedges and petitioner which are claimed by the Government to have produced the allegedly illegal offers or requests by petitioner involved in the present indictment, Hedges was admittedly acting as a Government operative. These conferences, all of which occurred at the Westchester County Jail under circumstances in which petitioner believed that she and Hedges were conferring in the attorney-client relationship, were subjected to electronic surveillance on certain specific admitted occasions, and to additional electronic surveillance of undetermined extent.[2] Although no taped evidence was introduced in this trial as to any such electronic recordings, the fruits thereof were used against petitioner. We urge as a prime issue in this petition, that the indictment against petitioner must be dismissed on fundamental constitutional grounds by reason of the Government's extraordinary conduct in thus having invaded the attorney-client status, and in having perverted

[2] The eavesdropping at the Jail, and the conduct of the Government's scheme as a whole for using Hedges to spy on petitioner, are well described in Judge McLean's opinion of February 21, 1966, printed in our Supplemental Appendix and in co-petitioner Pacelli's Appendix C, Docket No. 557, and in *United States* v. *Kahn*, 251 F. Supp. 702.

that constitutionally important status by stealthy and deceitful methods for the express purpose of invading petitioner's own constitutionally protected right of privacy and freedom from self incrimination. We are respectfully advancing these constitutional contentions in this petition for certiorari notwithstanding that the electronically obtained "evidence" was not directly used in this trial. Our focus, then, in urging these constitutional contentions, is not merely upon the fact that the Government electronically eavesdropped conversations between an attorney and client in prison premises reserved for confidential professional discussions, but, more important, our focus is upon the Government's having procured the client to entice the attorney into alleged commission of crime.

Reasons for Granting the Writ

Because the extraordinary conduct, indeed the probably unique conduct, of the Government's officials in the "making" of this case and in the obtaining of the indictment, i.e., their procuring Hedges to spy on his own lawyer during professional jail visits and to discuss with the attorney alleged proposals to obstruct justice (plus obtaining Hedges' "consent" to electronic eavesdropping), is so offensive to due process and so subversive of the attorney-client relationship as to justify this Court in exercising its supervisory power over the decent administration of federal criminal Justice.

The outrageous nature of the unconstitutional misconduct of the Government's officers calls not only for individual redress on behalf of petitioner, but equally and even more it calls for exemplary corrective action in the public interest. If this indictment and this conviction are not nullified, neither the practice of law by the profession

nor the obtaining of effective legal services by the people will ever again be safe in this country from the zeal of a prosecutive officialdom playing upon the susceptibilities of incarcerated persons or of persons who fear criminal prosecution.

The unconstitutional vice of the Government's conduct in this case should be discerned as residing not primarily in the secret electronic surveillance of the appellant's professional consultations with her client in prison premises ostensibly reserved for such confidential meetings, but in the fact that the Government actually procured the client not only to spy upon the attorney but to engage in alleged criminal discussions so as to entice and even to provoke the attorney into alleged crime under the deceit and guise that the participants were continuing to deal with each other as client and attorney.

In any event, the electronic surveillance done here does not have the assured constitutionally tolerated status which the courts below assumed because this Court has but recently undertaken to review this type of privacy-intrusions.

We respectfully believe there are supremely important constitutional problems which this case presents under the Fourth, Fifth, Sixth and Ninth Amendments. At the same time, we would preliminarily state also that our commencement of this argument with a constitutional "plea in bar" as it were, is done with some diffidence since petitioner is a member of the Bar of this Court, accused of serious crime importing possibly fatal unprofessionality. We therefore hasten to add that in thus giving primacy to our constitutional contentions in this petition, we are surely not suggesting that the petitioner's case lacks just merit on the facts. On the contrary, the very pattern of the strangely mixed jury verdict of acquittal on the sub-

stantive counts and conviction on the conspiracy count, heartens petitioner in her expectations that certiorari may be granted and it may conclude that this conviction is factually, and not only legally, wrong.

The essential facts on which we urge the constitutional contentions require no lengthy repetition. The Federal Narcotics Bureau began, in the year 1961 or 1962, its efforts to deal unilaterally with Charles Hedges behind the back of his attorney, petitioner Kahn. Nor was it long in this process before the design was under way to make the attorney's back not only a screen but a target. Hedges was metamorphosed by his jailers from client to secret police operative. With admittedly impressive success—for in Charles Hedges the Government had a past master of guile—the treachery was kept concealed from the victim attorney. Under the plenary "administrative" control of his Narcotics Bureau overseers, Hedges puppeted exactly what was wanted of him. He continued, with perfection throughout, the pose of "client", while actually functioning as a secret policeman against his own attorney. He "consented" to the installation of electronic eavesdrop devices which would audit his conversations with petitioner at the prison.[3] But above all, we again emphasize, Hedges let himself be used by the Narcotics Agents to try to betray his attorney by lulling her in the belief that she and Hedges were functioning solely in the relationship of attorney and client. The situation which prompted Mr. Chief Justice Warren in *Spano* v. *New York*, 360 U. S. 315, to refer to John Gay's couplet

"An open foe may prove a curse
But a pretended friend is worse."

[3] See the hearings in the Trial Court on the motion to suppress the electronic eavesdrops, paged in the Supplemental Record on Appeal as pp. 1-371a, these being also the numbers in the pagination of the original minutes. See also the next footnote herein.

was as a Sunday School picnic compared to the Governmental breach of the constitutional decencies which has happened in this case.

Petitioner moved unavailingly before trial for inspection of the Grand Jury minutes and for dismissal of the indictment on constitutional grounds substantially similar to those which we here urge. See her Notice of Motion dated November 16, 1965 (pp. 11-20 of the Record on Appeal).[4]

We realize the force of the prevailing convention in the Federal Courts against the granting both of motions to inspect Grand Jury minutes and of motions to dismiss indictments on the ground of reception of unconstitutional evidence by the Grand Jury. However, in the extraordinary circumstances of this case there should have been, at the very least, an inspection of the Grand Jury minutes to determine whether the peculiarly odious electronic eavesdropping resorted to in this case had resulted in any evidence submitted to the Grand Jury. More fundamentally, however, there should have been an inspection of the Grand Jury minutes as a deliberate judicial means of paving the way for an undoing of the indictment obtained as the result of the constitutionally perverted police methods used to "make this case".

The Federal Courts had several times held that an indictment is dismissible on the ground that it was based solely upon evidence procured in violation of the accused's constitutional rights—which is the situation that we claim is presented here, since all indications are that the case against petitioner was made solely on the strength of the deceptive and enticing activities of Hedges acting upon

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[4] The motion for suppression of the eavesdrop evidence was denied. See the last preceding footnote, and Judge McLean's opinion dated February 21, 1966 (printed in our Supplemental Appendix in the Court below, *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702).

the Government's instructions. The constitutional theme just mentioned is stated in the following quotation from the *Annotation* entitled *"Competency Or Sufficiency Of Evidence Before Grand Jury As Affecting Validity Of Indictment Or Conviction In Federal Court,"* 100 L. Ed. 404, at 407-408.

It is hardly necessary to cite authority for the proposition that this Court, in appropriate cases, enforces upon both the Federal and state policemen of this country the fundamental standards of decency and civilized conduct for which our society and our system of government stand. E.g., *Rochin* v. *California,* 342 U. S. 165; *Mesarosh* v. *United States,* 352 U. S. 1.

In enforcing these standards in Federal criminal prosecutions particularly, this Court exercises that familiar, potent, residual monitoring and sanitizing authority known as the supervisory power over the administration of Federal criminal justice. *McNabb* v. *United States,* 318 U. S. 332, 341; *Marshall* v. *United States,* 360 U. S. 310.

In considering the proper procedural course which this Court may see fit to take in the event it determines that we have in truth suffered constitutional injustice which needs to be redressed, the Court will take into account, we of course realize, that electronic eavesdrop evidence was not introduced in this trial—hence the case is not technically one involving problems of "suppression of evidence" as such at the trial level. However, a reading of Judge McLean's opinion in this case denying our motion to suppress,[5] makes it rather clear, we think, that the Judge, in his whole approach to this branch of the case, was decisively influenced by the fact that this Court had theretofore refused to disapprove on constitutional grounds electronic

[5] See *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702.

eavesdropping of the type here involved where one of the parties to the eavesdropped conversations has "consented" thereto. Judge McLean cited the familiar Supreme Court case, e.g., *On Lee* v. *United States,* 343 U. S. 747; *Lopez* v. *United States,* 373 U. S. 427. However, about three weeks before Judge McLean rendered the opinion referred to, this Court had granted certiorari in *Osborn* v. *United States,* 382 U. S. 1023, 86 S. Ct. 644, 15 L. Ed. 2d 538, to review the constitutionality of this very type of "consented to" electronic eavesdropping. To be sure, *On Lee* and *Lopez* remain the law in the meantime. But we respectfully request this Court, in making its overall evaluation of the constitutional aspects of our case, to take into account that the electronic eavesdropping which the Government here carried out with Hedges' consent at the Westchester County Jail may no longer be assumed with absolute confidence to have been constitutional as an "open and shut" matter.

In this newly dubious light in which such electronic eavesdropping must now necessarily be regarded since the granting of certiorari in the *Osborn* case, the entirety of the Government's conduct in our situation comes in for stricter scrutiny, we submit.

In any event, as we have above suggested, the ultimate constitutional focus in our case, as regards the question of the constitutionality of the Government's conduct, should be on the way in which the Government used Charles Hedges—irrespective of the factor of electronic eavesdrops. This ultimate constitutional focus reveals a horrendous violation of due process of law, repellently further tainted moreover by a perhaps even more frightening subversion of the great Anglo-American institution known as the attorney-client relationship.

Petitioner has been the victim of an all but incredible violation of her rights of due process of law, through having had secretly thrust upon her by the Federal Narcotics Bureau a lethal instrumentality under the form and guise of a trusted "client". One hardly knows where to begin to catalogue the incidents of constitutional offensiveness which have here taken place. Shall one list first the sheer element of indecency and treachery resorted to by Federal government officials? Or shall one list first the constitutionally blind misuse of the attorney-client aspect? Or the use of supposedly constitutionally sheltered official governmental premises as the scene for the plan? Or the conscioncelessness of the official abuse of the prisoner-status of Hedges himself? Perhaps our own choice for first place in this catalogue of unconstitutionalism[6] would be the emphasis upon the literally terrible undermining of confidence as between attorneys and clients which must henceforth spread like a poison if not like a rampant plague unless this Court scotches the evil by granting the petition for certiorari.

We do not think that any extended argument is needed to demonstrate that the pattern of the Jury verdicts as to the three defendants and as to the several counts raises very disturbing questions as to the rationality and the justice of the conviction of petitioner on the conspiracy count alone. We know that the Federal decisions speak a virtual refrain of the theme that verdicts under multiple count indictments need not be consistent; and that some

[6] This Court's own first choice might well be that the Government's officers with full knowledge of Hedges' recantation to them of his claims of innocence in the Connecticut trial (a knowledge which petitioner did not share), let Hedges go *before the Court below* in 1963 to continue his former protestations of innocence, in the appeal from Hedges' Connecticut conviction (*United States* v. *Cianchetti*, 315 F. 2d 584 (C. A. 2 1963)). The Government thus apparently connived with Charles Hedges to deceive not only petitioner, but *even the Court below*.

of the cases even say such verdicts need not be rationally consistent, or that a verdict of conviction under a particular count need not be rational in relation to the verdicts on other counts. We also know that this principle is especially steadfast when inconsistency is sought to be urged as between conspiracy and substantive counts.

However, before going into the brief recitals which we desire to make concerning the relationship of the charges, proofs and verdicts under the respective counts of the within indictment, we call attention to the fact that the rigid Federal rule above mentioned has from time to time produced judicial expressions denoting less than an entire satisfaction with the rule; and we think we can show that appellate dissatisfaction with the rule would be very strongly justified indeed on the facts of our case. See, for example, *United States* v. *Maybury,* 274 F. 2d 899 (C. A. 2 1960), declining to apply the rule in a non-jury case. See also *Parr* v. *United States,* 363 U. S. 370, 393-394, where the Supreme Court disapproved a conspiracy conviction on the ground that, on the facts presented, a substantive count whose violation was the subject matter of the conspiracy count could not be sustained. There have been expressions in other cases denoting a less than absolute commitment to the rule. E.g., *United States* v. *Albers,* 115 F. 2d 833 (C. C. A. 2 1941), declaring that the verdict was "not *so inconsistent* as to require that it be set aside"; *Apodaca* v. *United States,* 188 F. 2d 932 (C. A. 10 1951), remarking that consistency in a verdict is not "an *invariable* exaction of the law"; *United States* v. *Moloney,* 200 F. 2d 344 (C. A. 7 1953), stating that "*generally*" the verdict need not be consistent; *Heflin* v. *United States,* 132 F. 2d 907 (C. C. A. 5 1943) holding that the verdict did not give rise to "*fatal* inconsistency". And see especially *United States* v. *Wilson,* 342 F. 2d 43 (C. A. 2 1965), stating that the

verdict "was not *wholly irreconcilable* with *any* rational theory". (Emphasis supplied.)

We submit that the verdict of conviction of petitioner under the conspiracy count is "wholly irreconcilable with any rational theory". We do not expect the Government to dispute—and if we are wrong in this we await with interest the Government's reasons for so disputing—that with a single possible exception to be mentioned in a moment, every single item of charge or *probatum* which might avail to sustain the conspiracy conviction of petitioner was adjudicated in her favor by the Jury when they acquitted her under the substantive counts (Counts Six and Seven). The single exception just alluded to would be with respect to the item of subornation of perjury in the conspiracy count, which is not charged in any of the substantive counts, all of which charge obstruction of justice.

We believe the Government will not dispute that the only item in the trial proofs on which any charge of subornation of perjury by any defendant might hinge is the alleged suggestions by petitioner to Hedges that he should push back certain dates to defeat the Government *via* the statute of limitations. We think we have shown in our Statement that, probatively, this item in the Government's case is very thin at best and would form a slender reed on which alone to sustain the conspiracy conviction. Furthermore, under the wording of Count Seven, one of the substantive counts on which petitioner was acquitted, the Jury must have had to pass upon this very item in the proofs, because Count Seven speaks of an "endeavor to alter", etc., the testimony of Hedges.

We think that the only *logically* sound argument that the Government could make in reply to our last suggestion (that the Jury must have considered the "statute of limitations" push-back item under Count Seven), would be an

answer which as a *legal* matter would place the Government in a self-defeating position. This answer would be that the Jury may well not have considered the item under Count Seven, because the Jury were given no adequate instructions by the Court to guide them in interpreting either the "alter" language of Count Seven or the "subornation" language of Count One. And this last is indeed the fact. It is a remarkable thing, throughout this trial record, including the instructions to the Jury, that no one perceived the importance or the possible importance (as matters turned out) of the subornation problem.

And once we do address our attention to this subornation problem in the instant case, we see that substantial attention had to be (but was not) given to it. What, for example, of the question of whether petitioner, in her alleged attempt to suborn Hedges to push back the Aspelund dates, was in fact trying to suborn a *perjurious* statement? Is it to be simply taken for granted, in so grave and dire a human situation as a prosecution for crime, that the Government's charge that what petitioner allegedly wanted Hedges to do was false, is somehow self-evident or *ipso facto* proven? The Government's single apparent effort at coping with this problem, namely, the reading into the record of the few lines of Aspelund's Connecticut trial testimony, did not reach the issue which we are here posing. That fragment of Aspelund's testimony was expressly given to the Jury by the Court under the admonition that it was not to be considered for the truth of its contents (Tr. 943-954, 1135-1138, 1142-1144).[7]

The Government never reached, then, much less did it establish by proof *of any sort or degree,* the indispensable subornation question of whether anything of a false nature

[7] Numerals in parentheses preceded by letters "Tr." refer to pages of the Trial Record.

was allegedly being suborned at all. To which should be added that, on the contrary, as was brought out in petitioner's testimony (*supra*), no one having any familiarity with the Hedges investigation or with the Connecticut trial, where petitioner was Hedges' attorney, could have supposed seriously that any mere "push back" of the "Aspelund dates" could be effective for the sinister purpose suggested by the Government. Hedges in the Connecticut trial record alone had committed himself to a date late in 1960 with Cahill.

True, Hedges in the Connecticut trial was not speaking of narcotics, but there is proof that his Connecticut defense was contrived around a structure of basically true facts (cf. 1254-1270), and this is dispositive of any suggestion that Hedges was not in fact still connected with Cahill late in 1960. Pat Hedges testified she prepared the Connecticut trial script in her apartment (Tr. 1022) and all information was furnished by Charles Hedges (Tr. 1029-1030). Miss Kahn's Exhibit "U" was in Pat's writing (4 pages) (Tr. 1023) but Charles denied it (Tr. 668).

Furthermore, if we are correct in our analysis that Hedges' story about the push back of dates is probative if at all only with relation to a time subsequent to his having already testified before the Grand Jury and committed himself to "dates", then there arises the additional compelling question of law as to whether petitioner could have been committing a crime at all in what she is alleged to have done as regards the subornation charge. There is no more elementary principle in the criminal law than that a criminal act cannot arise upon the actor's illusion or error as to the existence or presence of the potential or intended *corpus delecti*. If the facts are as suggested in our analysis—i.e., if it was not probatively established that Hedges and petitioner spoke about the push back of dates until after Hedges had already testified before the

Grand Jury on June 29, 1964—then petitioner could no more be guilty of subornation or of conspiracy to suborn than if she shot a pistol in the night at a tree thinking it a human being, or than she would be if she conspired to murder someone who was already dead.

It remains to consider, on the factual side, the items in the Government's proof which the Court instructed the Jury related particularly to the conspiracy count, i.e., as not being embraced in the basic evidence under the substantive counts. See the Court's charge at 623a-624a. These special "conspiracy" items were the Joan Hedges' testimony about Pacelli's bail assistance to Hedges, the testimony that petitioner asked Mr. Kestnbaum to represent Pacelli on a bail application, petitioner's testimony that she had done some slight commercial legal work for Pacelli, and the admitted facts that Schawartzberg and petitioner are associated as employer and law clerk in her law practice. Manifestly the only purport of all of these items is to show some kind of linkage or connection, not in itself of a sinister nature in any instance, among the three petitioners. None of these items touch at all upon the commanding question of what proof is there that petitioner committed any conspiratorial crime, in view of her acquittal on the substantive counts and in view of the fatal defects above pointed out in regard to the subornation of perjury factor.

We respectfully call attention to *Manley v. United States* (C. A. 6, 1956), 238 F. 2d 221 at 222:

> "But, when an obviously inconsistent verdict as to different counts of an indictment or information is returned by the jury, both the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

The Court below held, in its opinion, that:

> "The acquittals at most indicate inconsistency in the jury's verdict, which is not by itself grounds for reversal, *Dunn* v. *United States,* 284 U. S. 390 (1932); see *United States* v. *Maybury,* 274 F. 2d 899 (2d Cir. 1960)."

In the case at bar, the same evidence regarding the conspiracy and substantive counts were presented at the trial. Since the substantive counts cleared petitioner by the jury's acquittal then the conspiracy count necessarily falls with it (see *Paar* v. *United States,* 363 U. S. 370 (1960)). Apparently the *Paar* case and the *Dunn* case are in conflict with each other according to the facts in this case. This Court should grant certiorari for this reason also.

The petitioner Kahn was denied a fair trial and due process of law by the Trial Court's rulings in regard to Hedges' claims of the privilege against self incrimination and the attorney-client privilege.

A prime issue in this case was the question of the *bona fides* of the numerous visits by petitioner to Hedges at the Westchester County Jail. These visits were used by the prosecution to the hilt in order to condemn petitioner as having had no cause to visit Hedges except to try to influence him as a prospective witness. It was vital for petitioner to be able to adduce all proper evidence that could depict her visits as having been for legitimate legal consultation with Hedges. This was prevented, however, by the Court's granting of Hedges' invocation in several crucial instances of the privilege against self incrimination or the attorney-client privilege or both of those privileges in combination.

In *Hunt* v. *Blackburn,* 128 U. S. 464, this Court stated that "if the client has voluntarily waived the privilege, it cannot be insisted upon to close the mouth of the attorney". In *Farnsworth* v. *Sanford* (C. A. 5, 1940), 115 F. 2d 375, 377, the Court said:

> "When in such a proceeding a client charged his counsel with misconduct and discharged them, we think he has no right to be free, of contradiction in testifying about the misconduct. He waives the privilege of the communication by himself making it an issue to be tried and testifying about it." [citing Hunt v. Blackburn, 128 U. S. 464, 470.]

See also *Wigmore On Evidence,* Vol. VIII (McNaughton Rev.), § 2327, at p. 638.

See also Chief Judge Sobeloff's concurring opinion in *United States* v. *Kendrick* (C. A. 4, 1964), 331 F. 2d 110, 116-117:

> "Waiver of important rights is not lightly presumed, and will be found only upon a clear and compelling showing. * * * [citing Hunt v. Blackburn, *supra,* Farnsworth v. Sanford, *supra,* and other cases]. With the majority, we recognize that the rule of privilege in the attorney-client relation is subject to an exception when the lawyer is attacked. In that case he may defend himself."

As regards Hedges' resort to the Fifth Amendment privilege in matters as to which he had himself already opened the door, or as to which he had no "reasonable fear" of self incrimination because the statute of limitations had run, we respectfully submit that the Trial Court not only abused its discretion in sustaining his claim of privilege (and thereby

further blocking off petitioner from eliciting vital evidence as to the subjects of her legitimate lawyer's visits to Hedges), but its rulings were erroneous as a matter of law. *Wigmore, op. cit.*, §2276.

The petitioner was denied a fair trial and due process of law by improper summation by the prosecutor.

The prosecutor (at Tr. 1675) practically in so many words said to the Jury that the Government was in possession of some kind of additional secret evidence which it might have used to convict petitioner. The prosecutor's language was

> "* * * With regard to this question of whether or not Hedges ever mentioned the $25,000 bribe to her, do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise".

It is not difficult to surmise what the zealous young prosecutor here had in mind, and in view of the inordinate pretrial publicity which attended this case it is not difficult to guess that the Jury well understood what the prosecutor meant. The prosecutor, if we may speak plainly, was here openly hinting at the Government's supposed possession of incriminating electronic recordings and of the Jencks Act material which was announced in the Jury's presence by the prosecutor over petitioner's objection. But even if our suggested inference is not acceptable to this Court, the prosecutor's conduct was indefensible and caused fatal prejudice.

The petitioner was denied the opportunity for a fair trial of the distinct issue of her own individual guilt or innocence, and a fair trial opportunity to adduce testimony in her defense which she was precluded from using owing to the joinder of defendants in this trial, by the denial of her motion for a severance.

All petitioners in this case moved for severance before the trial, either by independent motion or by adoption of each other's motions. If petitioner had received a severance, she could have called co-petitioner Schawartzberg as a witness, in the confident expectation that he would give exculpative testimony. In the instant trial petitioner was of course precluded from summoning any co-defendant to the witness stand.

The situation thus presented would appear to be effectively if not squarely within the principles laid down in the recent decision by the Seventh Circuit in *United States* v. *Echeles*, 352 F. 2d 892, 897-899 (C. A. 7, 1965), where the Government's petitions for rehearing by the Panel and En Banc to reconsider the reversal of the conviction were denied. The conviction—of an attorney on conspiracy and substantive charges of obstruction of justice and subornation of perjury—was reversed on the ground of improper denial of a severance, in that the joinder of defendants necessarily precluded the defendant-attorney from calling as a defense witness a co-defendant (a former client of his) who might have given exculpative testimony. The Court in *Echeles* wrote as follows, and we respectfully invite this Court's attention to the several points in the following quotation which afford very close resemblances to our case (352 F. 3d at 897):

> "But equally important is the 'universally held' interpretation of this right prohibiting any person who is on trial for a crime *from being called to the witness stand.* 8 Wigmore on Evidence 406 (Claim of Privilege, §2268): McCormick on Evidence, 257-259 (Self-incrimination, §124) (1954). The second protection applies without regard to the nature of the intended inquiry; that is, a defendant on trial cannot be required to take the stand to answer even the most innocuous,

non-incriminating inquiries. Nor does it make a difference whether the defendant is called to the stand by the prosecution or a co-defendant. 8 Wigmore on Evidence 410 (Claim of Privilege, §2268)."

The Court further stated, at 898, *supra*:

"Thus, Echeles could not properly call Arrington as a witness during Echeles' case in chief. For if Arrington declined to take the stand, as was his right, Echeles' action in calling him and forcing him to decline to do so in front of the jury would have injected prejudicial error into the record as to Arrington." • • •

"• • • if an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."

Our main focus is on the Government's having procured Hedges to feign a continuing attorney-client relationship, and, moreover, to employ guile and enticement to prolong the feigned relationship over a period, variously measured, of some one to two years or more—all done with a view to petitioner incriminating herself. This cardinal—and, we submit, dispositive—constitutional feature of the case went unnoticed in the Government's Brief below.

For understandable reasons, the Government prefers to have a Court view our constitutional contention in the reductive terms of the eavesdropping issue alone. The eavesdrops were not used at the trial, but the fundamental constitutional vice in the Government's having used Hedges for prolonged deceitful exploitation of the attorney-client relationship is intrinsically and ineradicably present in the

record of this case, was duly raised by pre-trial motions, and should not be ignored.

Entirely aside from eavesdrops, Hedges' testimony before the Grand Jury was constitutionally tainted because of the antecedent deceits which subverted the attorney-client relationship.

As regards instructions given to the jury on the elements of subornation of perjury, the following are all of the instructions on that subject (615a, 616a, 618a):

> "Now, the other statute mentioned in this indictment 18 United States Code Section 1622, isn't mentioned up until now. And this makes it an offense against the United States to procure another to commit perjury.
>
> A person commits perjury when, having taken an oath before a competent tribunal in any case in which a law of the United States authorizes an oath fully and contrary to such oath states any material matter which he does not believe to be true" (615a).
>
> • • • • •
>
> "That it was further a part of the conspiracy that defendants unlawfully, wilfully and knowingly would corruptly and by threats influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the aforesaid proceeding and investigation and that it was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would procure Hedges to commit prejury in his testimony before a United States grand jury and the United States District Court in the aforesaid proceeding and investigation" (616a).
>
> • • • • •

"Evidence of the same intent and knowledge is required to convict a defendant for conspiring to influence a witness, or conspiring to obstruct the due administration of justice, or conspiring to suborn perjury, as would be required to convict a defendant of committing any one of these three crimes" (618a).

* * * * *"

The above quoted generalized "instructions" on subornation of perjury must have been meaningless to the jury. It is elementary that, at the very least, the jury should have been told that the alleged suborners (or conspiring suborners) must be proved to have known or believed or have good reason to believe that the testimony sought would be false, and also that the witness so sought to testify would do so with knowledge of falsity. *Petite* v. *United States,* 262 F. 2d 788 (C. A. 4, 1959), remanded on other grounds, 361 U. S. 529. See also *Segal* v. *United States,* 246 F. 2d 814 (C. A. 8, 1957), cert. denied 355 U. S. 894.

In view of the evident impossibility (for all of the reasons which we have suggested) of sustaining the conspiracy conviction on the basis of the alleged subornation, the case presents the insurmountable difficulty that since no one can say whether the jury convicted for conspiracy on the basis of obstruction of justice rather than subornation of perjury, the verdict under that count cannot stand at all. Cf. *United States* v. *Robbins,* 354 F. 2d 741, 742 (C. A. 2, 1965), where, in an analogous situation, the Court remarked that "It is impossible to ascertain the exact basis for appellant's conviction", and it reversed the conviction upon finding that one of the two alternative bases upon which the jury might have convicted was not sustainable—which is exactly (indeed *a fortiori*) the situation presented here.

The Government's suggestion that petitioner deliberately invited imposition of the attorney-client privilege to mislead the jury is ridiculous.

The Government's invidious suggestion that petitioner preferred to portray herself to the jury as an attorney who could have told them a great deal more about her legal business with Hedges at the prison if her lips were not sealed by the attorney-client privilege is pure speculation. The only item adduced by the Government in support of this speculation is that petitioner's trial counsel in summation told the jury that petitioner's opportunity to speak more fully about the prison visits had been curtailed because of the Court's sustainment of Hedges' claim of privilege (Tr. 1594).

If we are correct in our contention that it was error to restrict petitioner's testimony in the interests of Hedges' privilege, the error was fatally prejudicial in the most concrete way. A main issue throughout the trial was whether petitioner's numerous visits to Hedges at the Westchester County Jail had or might have had a legitimate explanation on the attorney-client basis. By preventing petitioner from giving additional testimony about what was discussed in those visits, the Court *pro tanto* weakened this vital line of her defense. We think that the measuring of the prejudice thus caused should not be done "with eagle's eyes" to turn the scales of justice against petitioner in these circumstances. It is undisputed that the matters which were blocked off by the restrictive privilege-rulings included at least two or three serious criminal involvements on Hedges' part as to which petitioner wanted to tell the jury of her attorney-client discussions with Hedges at the prison. At the very least, the interference with our further opportunity to impeach Hedges' credibility in these regards was injurious and should be considered in evaluating the overall

prejudice caused by the restrictive rulings above referred to.

The Government's contention, *dehors* the record, that it could have proved guilt from the tape recording and the Jencks Act material is to be condemned.

The prosecutor's statement in summation that the jury had no way of knowing whether the Government could have proved "otherwise", had petitioner denied it, that Hedges had mentioned to her a $25,000 bribe offer (Tr. 1675) is deplorable. The Government seeks to justify the prosecutor's language on the ground that petitioner's trial attorney in summation had told the jury that petitioner had not needed to tell the jury of Hedges having mentioned it to her and that she could have told the jury she never heard of any money (Tr. 1615). If that is the Government's only justification for then having gone on to tell the jury in practically so many words that the Government possessed additional proof not used at the trial, the prejudice and the inflammatoriness remain unallayed. For the Government's rationale here is that a defendant's use of an allegedly false defense in a criminal trial justifies the Government in trying to condemn the defendant in the jury's eyes, not by sworn proof in reply, but by hints and insinuations.

The Government made every effort to have its cake and eat it too—i.e., to avoid the constitutional dangers of using the eavesdrop evidence and at the same time derive the benefit thereof by imputational methods, and by parading a suitcase full of Jencks Act material before the jury and unduly emphasizing the contents.

The Court of Appeals, which held against the petitioner on all issues, acknowledged that there were numerous

errors committed at the trial, but these errors or improprieties, "taken by itself" is not sufficient grounds for reversal.

The Court below agreed with petitioner that the Jencks Act material ought not have been identified in the presence of the jury when Circuit Judge Moore, speaking for the Court of Appeals, stated:

> "[p]erhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, * * * but this, *taken by itself* is not sufficient grounds for reversal". (Emphasis supplied.)

Johnson v. *United States* (CA DC 1965), 347 F. 2d 803, 806, stands for the rule, *inter alia,* that in order to avoid undue prejudice which may arise from the jury's knowledge that the Jencks Act statements were available to the accused, the motion by the prosecution for their production should be made outside the hearing of the jury, and the actual handing over of the statements should take place with the jury absent, or at least unaware. In *Johnson, supra,* at 806, the Court stated that:

> "In this way full recognition is accorded the rights of the defendant under the Jencks decision as reaffirmed by Congress in the Jencks Act."

During the trial, the Court was the first to mention to the jury and to the prosecution the following regarding the Jencks Act material, at the time that Charles Hedges was still undergoing direct examination:

(117a-118a)

> "THE COURT: * * * And I realize when you conclude with the direct examination of the witness, the defendants are entitled to look at certain papers, and

it may take a little time, but it can't be helped. We will adjourn now until ten minutes past two."

In respect to the Court's remarks the prosecutor said:

(118a-119a)

"MR. JACOBS: Your Honor, I would tell your Honor there is a volume of material for the defendants to look at, your Honor, and I don't know how much time they are going to ask for, but I am just trying to see if we could work it out, your Honor. I have a briefcase full of material, your Honor, and just to give your Honor an idea of what it entails—"

"THE COURT: It may be that the jury will have a fairly long recess after lunch."

The prosecutor, in the presence of the jury, compounded the error by alluding to a "briefcase full of material", simultaneously pointing to a suitcase, and would have then itemized the Jencks Act material but was interrupted by the Court.

At a sidebar conference Schawartzberg objected to the fact that "[T]he government made a statement before about a briefcase full of 3500 material. I think the jurors —it may be best for the jury to have it explained that briefcase—is not necessarily evidence in the case." To which, the Court replied, "I am not going into that now."

The prosecutor then commenced to announce and unduly emphasize all the Jencks Act material for the benefit of the jury. Petitioner's counsel objected to this prejudicial procedure since it was being done in the jury's presence. The Trial Court overruled such objection and stated:

"THE COURT: No, I don't think so. I explained to them yesterday this is a procedure that we go through in

these cases. I think they certainly go through the business of identifying documents."

Taking a cue from the Trial Court's ruling the prosecutor continued to announce, identify and unduly emphasize all the § 3500 material in the jury's presence. Furthermore, Judge McLean continued to bolster the Government's case against petitioners by adding:

"The Court: Now, ladies and gentlemen, defense counsel tell me that they are still far from completed in their task of reading this material which has been turned over, *which I can say is quite voluminous,* and they are certainly entitled to a fair chance to read it, and I think it would be better to let you go now rather than keep you sitting around here for what might be, oh, at least an hour or more, I would think" (Emphasis supplied).

The jury, during the course of their deliberations, requested the reports of the Government's witnesses due to their awareness of the § 3500 material which had been identified by the prosecutor and the Court in the jury's presence. There is no reason why a recess could not have been taken first and after the jury had left the courtroom, the prosecution could have recited and itemized the Jencks Act material. Petitioners were seriously prejudiced thereby, for the prosecution waited until the jury had returned from its recess to read into the record before the jury's eyes and ears all of the Jencks Act material. After the material was handed over to the defense, the Trial Court then permitted the jury to enjoy "a long recess". When the jury returned from recess the Court informed them that defense counsel did not finish reading the voluminous § 3500 material and the jury was instructed to go home and return the following morning. With this admonition

of "quite voluminous" § 3500 material by the Court and prosecution, the jury was compelled to consider that the evidence against petitioners was overwhelming. The minds of the jurors were unequivocally prejudiced thereby. The Court below cited *Roberson* v. *United States* (6 Cir.), 282 F. 2d 648, 650-651, cert. denied, 364 U. S. 879 (1960) against petitioners but a review of said case shows that *Roberson* failed to object while petitioners timely and successively objected thereto. See, also, *Reichert* v. *United States* (CA DC 1966), 359 F. 2d 278, footnote 5 at p. 281 for the Court's views that Jencks Act material should be conducted outside the jury's presence, and the motions therefor plus the actual handing over of the material should take place with the jury absent.

The opinion further recites that the prosecutor did make an improper remark in his summation when he alluded to the existence of unused evidence.

In *Reichert* v. *United States, supra,* the Court, in reversing the conviction held that a reference by the prosecutor, on examination and upon summation, to statements taken from a witness which were never received in evidence was prejudicial error. Cf. *Kitchell* v. *United States* (1st Cir. 1966), 354 F. 2d 715 where the prosecution's references in summation to the availability of unused evidence constituted reversible error.

Not only was petitioner prejudiced by the Jencks Act material being itemized in the jury's presence, but the prosecutor alluded to this unused evidence, not in evidence, which moved the jury to request some of the Jencks Act material during their deliberations. But the prejudice had infected the juror's minds.

One cannot escape the fact that the Court's decision below in the instant case has now granted a blank check to the prosecution to intercept attorney-client conversa-

tions. Moreover, this carte blanche power, under its affirmance below, may possibly be construed as extending to any Assistant United States Attorney without authorization from a superior.

It is frightening to learn how vulnerable a lawyer is when faced with the systematic stripping away of one of the more fundamental rights enjoyed by people with a tradition of freedom and that right is the right to privacy in attorney-client conferences. The eavesdropping employed in the case at bar by separate teams of Government agents at the Westchester County Jail is shocking. The use of eavesdropping methods is inimical to our system of criminal justice.

The electronic surveillance evidence was gathered against petitioner in a constitutionally protected area, when she brought her law office to the infamous Westchester County Jail, scene of the Lanza brothers' invasion of privacy.

The constitutional right of privacy has been advocated in vigorous dissents since the days of Brandeis. Cf. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Clinton* v. *Virginia,* 377 U. S. 158 (1964) for the recognition of a constitutional right of privacy.

In *Lanza* v. *New York,* 370 U. S. 139, 144 (1962) this Court recognized that even in jail:

> "[T]he relationship which the law has endowed with particularized confidentiality must continue to receive unceasing protection."

This Court found that no attorney-client relationship had been alleged in *Lanza.* The case at bar presents a far different factual situation representing far more serious values, i.e., the attorney-client relationship. While we may concede, *arguendo,* that the privilege is solely the client's, this common-law rubric can in no way be inter-

preted as a license *ipso facto* for the Government to eavesdrop. This is particularly true where Hedges, the client involved, bargained with the Government.

While the Court below has isolated the errors in its opinion as insufficient to reverse when standing alone it is discernible from the four corners of its opinion that the errors do not stand alone. Indeed these errors fed and nourished each other to weave, in the end, a blanket of errors which deprived petitioner of her constitutional rights.

It is more than irony for the Court below to approve the practice of eavesdropping which the President of the United States has rejected. We cannot conceive that this great Court will lend its prestige to this sordid business engaged in by the Government in placing its imprimatur thereon, neither can we conceive that the Government would shy away from using this case as a license to continue such practices upon other attorneys throughout the country.

It should be noted that the Trial Court ruled that petitioner was Charles Hedges' attorney during the Westchester County Jail attorney-client visits in this case. District Judge McLean, in his opinion denying petitioner's motion to suppress the eavesdropping tapes and all evidence pertinent thereto, stated as follows *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702 at 706:

> "For the purposes of this motion, I shall assume that the attorney-client relationship existed at the relevant times, i.e., October 1963 and September and October 1964."

The Court below agreed there was a legitimate lawyer-client reason for the many visits by petitioner to Hedges in prison.

Hedges never informed petitioner she was no longer his attorney from the moment Hedges entered into the secretive agreement with the Government to pose as her client after all petitioner's legal services in Hedges' behalf had been performed on the judgment which Hedges was confined under. Petitioner has steadfastly proclaimed her innocence of the crimes charged to her. Petitioner never went to Hedges with any offers of bribes and with veiled threats that he better not testify against Pacelli. There were *four* eavesdrop recordings made by the federal agents of the conversations which ensued between petitioner and Hedges. The agents were also physically present in the Westchester County Jail at the time these respective recordings were made. They had an apparatus which permitted them to personally hear and eavesdrop upon the attorney-client conferences. Yet, neither the eavesdrop recordings nor the personal testimony or § 3500 reports of the federal agents were able to confirm Hedges' and his wife's concocted story pertaining to any bribe purportedly offered by petitioner.

Moreover, it is of significance to observe that one of the key witnesses, used by the Government against Pacelli at his trial for conspiracy to violate the narcotic laws, one James Godwin, who happens to be a cousin of Charles Hedges, another key witness at Pacelli's narcotic trial, caused Godwin's emissary to notify co-petitioner Schawartzberg that the Government was about to send the eavesdropping tapes to a sound laboratory to be edited and doctored so as to incriminate petitioner. This unsolicited tip on Godwin's part spurred Schawartzberg to forthwith move the District Court (TENNEY, J.) for the impoundment of the eavesdropping tapes. See Appendix F hereto, infra, for the Court's order. See, also, Appendix F for another order made by the District Court (SUGARMAN,

J.) which excluded the main federal agent, Thomas J. Dugan, from attending at the reclarification process. When Schawartzberg discovered that the tapes' seal had been broken without authorization by the Court, he then moved to have two prosecutors and agents cited for contempt. See Appendix G hereto, infra, for the Court's order denying said motion. Schawartzberg appealed the order as being interlocutory under Docket No. 30381 and the Court below dismissed the appeal. There was a petition for certiorari filed as Misc. No. 228 which is currently pending for decision by this Court. If ever there was a case of "dirty business" this is it. Appendix J hereto, infra, supports our position in that an electronic expert submitted his affidavit to the Court expressing violation on the part of the prosecution and Government agents.

The Government represented to the Trial Court it was going to use the eavesdropping tapes [506-508][8] against all defendants [508]. The Trial Court denied petitioner's motion for suppression of these tapes and/or the fruits thereof *United States* v. *Kahn* (SDNY 1966), 251 F. Supp. 702; see, also pp. "S1a to S16a" inclusive of petitioner's Supplemental Appendix appended to her main brief for the opinion (*ibid*). The Government went so far as to have Judge McLean waste more than four hours listening to the three or four taped eavesdrop recordings and then failed to play these tapes for the jury's benefit notwithstanding the petitioner's motion for suppression thereof and its fruits was denied. The answer lies in the fact that these tapes were used against petitioner to her substantial prejudice, e.g.:

1. (Tr. 1378) On cross-examination petitioner admitted discussing the Ambassador's case with Hedges on September 27, 1964, [one of the taped sessions];

[8] Numerals in brackets refer to pages of pre-trial record.

2. (Tr. 1392) Petitioner further admitted she told Hedges that Pacelli told her he would get "legal aid" for himself after his arrest;

3. (Tr. 1393) Petitioner was not sure whether Hedges told her "if Pacelli needed legal aid, where was Pacelli going to get $25,000 which I once told you about".

After obtaining on cross-examination, these statements from petitioner, which were audible on the tapes of three taping sessions, the Government didn't elect to use the tapes on rebuttal for they had accomplished their aim during her cross-examination.

Charles Hedges was the one who informed petitioner that someone had offered him a bribe not to testify against Pacelli and the others involved in the narcotics trial. Petitioner did not make any offer to him of any bribe. The eavesdropping tapes support petitioner in that the following is clearly audible:

By Charles Hedges:

"If Pacelli needed legal aid when he was arrested the other day, how was he going to pay me $25,000 which I once told you?"

By Frances Kahn:

"I told you not to believe him. They all promise you the world and give you Arpege."

Does the foregoing sound like a statement made by petitioner, a purported bribe offeree to Hedges? It should be remembered that Pacelli had just been arrested and was to later proceed to trial with Hedges as the chief witness against him, and if ever the bribe had to be offered it was

then. Instead, petitioner was discouraging Hedges as she had once done when informed of the bribe attempt by Hedges himself at the jail. However, the fruits of the tapes were used against petitioner at the trial in extracting the affirmation of a $25,000 discussion from her.

It has been held that eavesdropping on the conversations between an accused and his counsel by installing hidden electronic devices in the consultation room or planting informers to spy on the defendant's strategy violates the accused's right to communicate with his counsel and intrudes on privileged communication, and any information obtained thereby is not admissible in evidence.

In *Caldwell* v. *United States* (1953), 92 App. D. C. 335, 205 F. 2d 879, a government informer who won the confidence of a defendant and counsel so conducted himself that he gained free access to the planning of the defense, and he was present in a number of conferences with witnesses and lawyers for the defendant and reported whatever information he gained to the prosecution, including many matters connected with the impending trial of the defendant. It was pointed out that high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel, and that the Constitution's prohibitions against unreasonable searches, and its guaranties of due process of law and effective representation by counsel, lose most of their substance if the government can, with impunity, place a secret agent in a lawyer's office to inspect confidential papers, to listen to their conversations, and to participate in their counsels of defense.

Also, the conduct of sheriff's deputies in eavesdropping on the conversations between a defendant and his counsel was held to vitiate the whole criminal proceeding against the defendant in *State* v. *Cory* (1963), 36 Wash. 2d 371, 302

P. 2d 1019, 5 ALR 3d 1352. In *Cory*, the defendant appealed from a conviction of burglary and larceny, assigning as error the lower court's denial of his motion to dismiss the case, grounded upon defendant's claim that he was denied the full enjoyment of his right to counsel. It appeared that after defendant had consulted with his attorney several times, he discovered that his conversations were being eavesdropped upon through a microphone installed in the conference room, and when the matter was reported to the trial court, it conducted an investigation and discovered that the conference room did contain a microphone and that the conversations were listened to by the sheriff and his officers, whereupon the trial court ordered that the tapes be played for defendant and his counsel and also directed that the prosecutor might hear the recordings. Holding that the conduct of the sheriff's officers deprived defendant of effective representation of counsel, the Court stated that an attorney cannot make a full and complete investigation of both the facts and the law unless he has the full and complete confidence of his client, and that such confidence cannot exist if the client cannot have the assurance that his disclosures to his counsel are strictly confidential.

Although the Trial Court ruled that the privilege belonged to the client and not to the attorney, this case is exceptional in that petitioner was never notified, inferentially or otherwise, that she no longer represented Charles Hedges. This Court shouldn't view Hedges' testimony as evidence since he is an egregious self-confessed multiple prejurer, a narcotics seller, a murderer, etc. Hedges sought to use petitioner as his puppet simultaneously gaining favor with the Government. Despite the fact he confessed to his participation in a Florida murder he refused to admit to the jury that he killed Joseph Cahill for the large

sum of money which Cahill had in his possession during the Hedges-Cahill Connecticut trial at the time both of them were contemplating retainer of petitioner to represent Cahill. Although Hedges confessed in open Court that he killed the person with whom he had the gun fight—he never had previously admitted to the Government that he had shot and killed this person.

Furthermore, Hedges testified it was up to petitioner, not him, to waive the attorney-client privilege as recent as May, 1965 (Pacelli Trial Record, pp. 728-729, *id.*). Evidently Hedges rejected, asserted, feigned, etc., and reclaimed the privilege as was momentarily convenient. If a defendant would prevail upon a Government witness to deceive the Government into believing he was cooperating with them, the defendant would be arrested. Under our adversary system it was improper and wrongful for the Government to knowingly permit client Hedges to practice the deception upon his counselor.

It is apropos to mention that the Court below found there were two respective simultaneous electronic eavesdropping operations aimed at the Kahn-Hedges conferences at the jail. (See Motion to Suppress Hearing Minutes, p. 150; cf. *United States* v. *Kahn,* 251 F. Supp. 702, 705-706, *supra.*) The Court fixed the eavesdropping dates at that time as being December 1963 (at 705 *id.*), which is beyond the two months period permitted by the eavesdropping order executed September 20th, 1963 by State authorities in conjunction with Charles Hedges' consent given September 20th, 1963. Apparently both teams of eavesdroppers were listening illegally. See Appendix E hereto, *infra,* for the Eavesdropping statutes in New York State.

A constitutionally protected area is that area which the law has endowed with particularized confidentiality and receives unceasing protection against unlawful invasions.

See *Lanza* v. *New York* (1962), 370 U. S. 139. In *Lanza*, this Court wrote:

> "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, *there is no claimed violation of any such special relationship here.*" (Emphasis added)

The bugging practices used in this case was not licensed by this Court's decision in *Lanza* v. *New York,* 370 U. S. 139 (1962), *supra.* The Government has used the Lanza decision to forge new frontiers in the violation of individual privacy. If this decision is allowed to stand by this Court who knows what new frontiers the Government will invade? The Lanza decision came at a time when it wasn't clear that the practice of bugging was going to become a major force. No possible radiation of the Lanza decision can justify the bugging in this case. Petitioner is in a better factual situation than Lanza. Whenever this Court limits a decision the Government implicitly contends it is mere dicta and takes the result and expands the limited doctrine. Indeed, this case is the *reductio ad absurdum* of Lanza. This Court need not overrule Lanza but alternatively, this Court should exercise its supervisory powers over the administration of criminal justice in view of the attorney-client conferences herein which were bugged by the Government. It is not enough that the Government didn't use the tapes before the jury. They made their case through these tapes which resulted in a conspiracy conviction against petitioner.

Harry Lanza visited his brother, Joseph, who was incarcerated in the same Westchester County Jail assailed herein. He and his brother were left in the visiting room

to converse freely. No prison official was present. Unknown to them, however, a hidden electronic device was relaying their conversation to jail officials. Each word of the conversation was being transcribed and became a permanent record in the hands of law enforcement officials.

While a visiting room in a prison building is not constitutionally protected for most visitors, this Court recognized that it must give this protection where a confidential relationship is involved, *Lanza, supra,* (at 143-144). When the attorney was visiting her other clients at the same jail, did the electronic device suddenly turn itself off? Can electronic surveillance listen to one client and not to the other? Even if selectivity somehow could be accomplished technologically, would not the danger of this electronic surveillance still be great where it is operated by law enforcement officials who have an interest in everything which might be said? Does this mean that one in jail has no place where he can talk to a lawyer without being overheard through the ominous eye of surveillance? Has a lawyer no place where she can express herself or nowhere that she can talk with her client in privacy? When an attorney goes to a jail to visit her clients *she brings her law office with her.* Just as a doctor visits his patient in a hospital and comparable to a priest visiting a penitent.

For the Westchester County Jailer to permit petitioner to visit, confer and consult with Charles Hedges and other clients in an attorney-client relationship in a constitutionally protected area at the prison and then to secretly have client Hedges reject the benefits of such attorney-client immunization and to secretly record their conversations with the Government's connivance, does violence to the constitutional mandates prescribed by the Fourth, Fifth, Sixth and Ninth Amendments to the United States Constitution. There is no general federal statute prohibiting

eavesdropping. However, it appears from the concurring opinion of Chief Justice WARREN, in Lopez, *infra,* therein the Court implied that except as used in *Lopez* v. *United States,* 373 U. S. 427, 441 (1963), all other types of eavesdropping are condemned by the Fourth Amendment. Furthermore, three of the dissenting Justices in Lopez, *supra,* at 446, stated that all electronic eavesdropping, including wiretapping, are violative of the privacy clause of the Fourth Amendment.

Further, with this Court invalidating the State of Connecticut's birth control statute in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), it becomes hopeful that in the near future all types of wiretapping, and other forms of electronic eavesdropping, will be outlawed. The connection between the *Lopez* and the *Griswold* cases is the right to privacy, which in the Connecticut decision has been given a constitutional home for the first time.

Moreover, this Court should take judicial notice of the following:

a) Hedges' cousin James Godwin, the Special Employee, had informed petitioner that his superiors, the prosecution and agents, were about to send these eavesdrop tapes to a sound studio for alteration and editing in order to incriminate petitioner;

b) That the counsel room at the jail was a constitutionally protected area between an attorney and client;

c) That Judge TENNEY expressed the view that the prosecution was "sparring around" (347-348);

d) That Judge MCLEAN concurred in the view by stating that the Government was adding to its burden by "messing around" (630) with the tapes;

e) That former prosecutor Jacobs broke the chain of possession by breaking the seal of the master carton which contained the complete set of reclarified tapes;

f) That several federal agents participated in eavesdropping surveillance on the Kahn-Hedges conferences without any notice among them or to their superiors;

g) That an *ex parte* order was obtained by the Westchester County District Attorney on September 20, 1963, but a further order was rejected by the State Supreme Court and notwithstanding, the agents and Deputy Sheriff Thela (of Lanza eavesdropping fame) continued to record the Kahn-Hedges conversations;

h) That there was a long interval from the pre-arrest stage to the actual arrest. (Schawartzberg will treat this item more fully in his petition for certiorari.)

Insofar as Hedges' claims of privileges are concerned, if the answer to a question cannot in any way incriminate the witness, he must answer—there is then no constitutional right to remain silent. *United States* v. *Swift,* 186 Fed. 1002, 1009; cf. *Smith* v. *United States,* 337 U. S. 137. After the witness has given incriminating testimony, the privilege cannot be availed of—not so much because it has been "waived", but because the claim that further testimony would incriminate is untenable, incrimination having already occurred. See *Schoeps* v. *Carmichael,* 177 F. 2d 391, cert. den. 339 U. S. 914. It does not seem consistent for Hedges to testify against petitioner; claim his answers may be incriminating, Wigmore on Evidence, § 2272; *Maffie* v. *United States,* 209 F. 2d 225; 40 Amer. Bar Assoc. Journal 404, 502; 41 *ibid.* 307, and to then seal petitioner's lips when endeavoring to defend herself. See, too, 33 Univ. Chi. L. Rev. 151 (1965) Effect of Self Incrimination Upon the Accused.

With reference to the Fifth Amendment, Supreme Court Justice HOFSTADTER wrote in the "Aspects of the American Way" at p. 19 thereof:

> "Reliance on paid informers, without confirmation of secret charges and without opportunity of confrontation or rebuttal, is basically repugnant to American institutions."

If Charles Hedges was actually offered a bribe, then at any time during the two year period ending with the last visit of April 18, 1965, Charles Hedges could have requested that the $25,000 "be brought to the jail" and then, the prosecutor would not have had the need to testify in summation on behalf of the Government.

The prosecutor further remarked "that payment came from the defendant Pacelli" for those thirty visits to the Westchester County Jail (573a). This was an unfair statement of the case. The prosecutor knew from the testimony of Charles Hedges at the pre-trial motion to suppress hearing that Hedges had deceived petitioner into believing she was still his lawyer by falsely preparing legal documents for her perusal and approval which, of course, necessitated many visits to the jail, which was done with the connivance, concurrence, knowledge and participation of the United States Government Attorneys and Agents. The Court agreed that "there certainly is no evidence that the defendant Pacelli paid petitioner anything for going to the Westchester County Jail" (573a). In *United States* v. *Pepe* (2 Cir. 1957), 247 F. 2d 839 at 844, the Court condemned the prosecutor's summation for "[T]here was no basis in the record for the argument by the government that the testimony was 'bought, paid for, and delivered'."

In the colloquy which ensued between the prosecutor and the Court, Mr. Martin stated that the jury may draw

an inference that Pacelli paid Miss Kahn for the visits (573a). The Court replied (573a-574a):

> "The Court: Well, whether they can draw it or not, it should be very clear that this is purely an argument that they can draw an inference.
>
> "Mr. Martin: It certainly is.
>
> "The Court: And there is certainly no evidence of any such thing."

This colloquy had to confuse the minds of the jurors and could easily have led them to believe it was proper argument since they could not reasonably evaluate the difference between evidence, inference and argument. The jury was further confused by the Court's denial of all defense motions at that juncture for a mistrial (574a-575a).

The prosecutor improperly stated (565a-566a):

> "If defense counsel had any thought that his testimony, that that incident was anything other than self-defense, you can be sure that they would have gone into that on his cross-examination, but they avoided it and I submit that shows that they knew that this was self-defense—"

The defense objected thereto and it was sustained but the jury was not given any cautionary instructions with respect thereto. As far as further improper comment on the part of the prosecution is concerned, he misstated the facts to the jury that Charles Hedges "had no active case pending against him" when he knew that there was and still is a gun charge pending against him. All counsel agreed not to bring out the Hedges' shooting incident. The prosecutor misled the jury concerning the thirty-odd visits to the jail knowing full well that Miss Kahn visited

Hedges on some of the occasions with the knowledge of the Government concerning the practice of their deception upon her of legal work etc., which had been foisted upon her by Charles Hedges (Tr. 1668-1669), and he then stated no legal work had been done (Tr. 1669). Objections were properly and timely taken to the improprieties.

The Court below conceded that the prosecutor's allusion to other evidence was "improper" in his closing argument to the jury.

The Court of Appeals opined that although Schawartzberg could have testified in petitioner's behalf at a separate trial, "this possibility, standing by itself, did not make the denial of a motion for severance erroneous". The Court below added that "in the absence of anything in the record indicating that the co-defendant would have given exculpatory evidence." Petitioner respectfully refers this Court to co-petitioner Schawartzberg's petition for certiorari to be filed in the next day or so, for pertinent portions showing he has consistently offered exculpatory statements in petitioner's behalf and would have testified in petitioner's behalf had not the motions for severances been denied. He will also treat the denial of the change of venue in his petition for certiorari.

In *Roberson* v. *United States,* 364 U. S. 879 (1960) this Court denied certiorari. The Court below cited *Roberson* against petitioner. However, a reading of Roberson's petition for certiorari discloses that Roberson failed to object to the Jencks Act material being identified in the jury's presence. The Solicitor General's opposition thereto in *Roberson* recites, in pertinent part (at p. "11"):

> "There was no impropriety in permitting the jury to know that the government had turned over statements of government witnesses to the defense. No

objections on this ground were raised when the government attorney announced delivery of the statements. In view of the fact that defense counsel in the presence of the jury had made an unsuccessful motion for delivery of the statements by the witnesses at the start of the trial, it was not unreasonable to allow the jury to know that the prosecution had delivered the statements later in compliance with the statute."

Each of the foregoing questions presents vital and important questions calling for the supervisory power of this Court in criminal justice. As stated in *Olmstead* v. *United States* by Mr. Justice Brandeis, 277 U. S. 438, 485, "Our government is a potent, the omnipresent teacher". All of these highly important questions of criminal law in its supervisory capacity and in consideration of great and important questions of criminal justice under the standards of the United States of America should be passed on by this Court. If the Government could intrude with impunity, so would the defense lawyers into the offices of the prosecution their witnesses and their investigating agents.

The decision which this Court may render in this case will tell whether counsel and clients are guaranteed from unlawful intrusion by opposing prosecuting counsel or their secret agents and whether this relationship is protected by the Sixth Amendment to the Constitution of the United States; also by the Fifth Amendment to the Constitution of the United States entitling a defendant to the protection against self-incrimination and to procedure that results in a fair trial, as guaranteed by the due process clause of the Fifth Amendment, and by the Fourth Amendment, forbidding illegal searches and sei-

zures and by the Ninth Amendment, all embracing the right of privacy.

Basic justice, guaranteed by our federal Constitution, requires that these rights be safeguarded and preserved. We believe that the purity of justice must eventually be preserved by the courts where justice is exemplified. (*Olmstead* v. *United States,* 277 U. S. 438) The courts are the great teachers. Anything that pollutes justice at the beginning, contaminates the whole stream. It is only the courts rejecting evidence secured by any unconstitutional methods (*Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081) that can prevent injustice.

Petitioner hereby adopts all reasons in co-petitioner Schawartzberg's petition for certiorari insofar as they may be applicable to her.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

Dated: September 23, 1966.

Respectfully submitted,

FRANCES KAHN
Petitioner pro se
Member of the Bar
of the United States Supreme Court

O. JOHN ROGGE, ESQ.
Of Counsel

APPENDICES

APPENDIX A

Opinion of United States Court of Appeals, Second Circuit, Affirming Judgment of Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1965.

(Argued June 3, 1966 Decided July 18, 1966.)

Docket No. 30430

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCES KAHN, VINCENT PACELLI and ISRAEL SCHAWARTZBERG,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction for endeavoring to obstruct justice and conspiracy to obstruct justice, 18 U. S. C. §§1503, 371, entered in the District Court for the Southern District of New York after trial before Edward C. McLean, *Judge,* and a jury. Affirmed.

JEROME LEWIS, Brooklyn, N. Y. (Frances Kahn, Bronx, N. Y., and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant Frances Kahn.*

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., with him on the brief), *for the appellant Pacelli.*

ISRAEL SCHAWARTZBERG, Bronx, N. Y., *pro se.*

JOHN S. MARTIN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and John E. Sprizzo, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Frances Kahn, Vincent Pacelli, and Israel Schawartzberg appeal from judgments of conviction. All three were convicted of conspiracy to obstruct justice and suborn perjury, in violation of 18 U. S. C. §§371, 1503, and 1622. In addition, Pacelli was convicted of obstructing justice in violation of 18 U. S. C. §1503. Each appellant was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count.

1. *The Sufficiency of the Evidence.*

The Government maintained at trial, and the jury found, that the appellants worked together in an effort to prevent one Charles Hedges from testifying against appellant

Pacelli. On appeal, each of the appellants challenges the sufficiency of the evidence as to the counts on which he or she was convicted.

Viewing the evidence in the light most favorable to the Government, *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963), the following story emerges from the testimony at trial. Hedges was convicted for violation of the federal narcotics laws and was sentenced to fifteen years' imprisonment by the District Court of the District of Connecticut in March 1961. In July 1962, Hedges agreed to testify against certain of the people with whom he had been associated in the narcotics trade. His testimony before a grand jury in the Southern District of New York in June and September 1964 contributed to an indictment against Pacelli and others for conspiracy to violate the federal narcotics laws. Hedges testified at the trial on that indictment in May 1965.

Towards the end of July 1962, Pacelli visited Joan Hedges, Hedges' first wife; gave her $500; found out that Hedges needed $5,000 to get out on bail pending appeal; and learned that his lawyer was Frances Kahn. On July 30, 1962, Schawartzberg, Kahn's legal secretary, met with Hedges' fiancee and future wife, Patricia Curtin; gave her $3,000 of $5,000 he apparently had received; and instructed her to use the money to open a savings account to be used as collateral for Hedges' bail.

On January 9, 1963, Schawartzberg introduced Pacelli to Hedges' second wife Patricia, saying that Pacelli had put up the money for Hedges' bail. Pacelli told Patricia that he would give Hedges and her as much money as they needed to go away pending the appeal and even afterwards. Schawartzberg told Patricia that "he [apparently meaning

Pacelli] just doesn't want Charlie to do anything against him."

On January 14, 1963, Schawartzberg called Patricia, asked if Charlie was still Pacelli's friend, and said that Kahn was going to visit Charlie. Two days later, Kahn visited Hedges and asked what he intended to do. When he said, "Tell them to run because I'm through with them," she said: "I don't think that's like you. You wouldn't do anything like that." She made similar statements during her repeated later visits to Hedges whenever he indicated that he was thinking of "talking."

On September 22, 1963, Kahn told Hedges that if he didn't testify, Vince would lend him $25,000, which he wouldn't have to repay if he were indicted again, and that he would have complete protection.

In July and September 1964, Kahn told Hedges that if he were called before the grand jury he should push back the dates of his dealings in narcotics so that prosecution would be barred by the statute of limitations. In her July visit, she also told Hedges that if he did testify he should make sure that the Government guaranteed his wife's protection, since she was afraid for him and his wife; and she suggested that if he acted crazy he wouldn't have to testify. In an August 1964 visit, apparently referring to Hedges' intention to testify, Kahn said: "I hate to see you destroy yourself, and that's what you'll do."

The evidence just summarized was ample to take to the jury the question of appellants' guilt on the conspiracy count. We find no force in the contentions of Kahn and Schawartzberg that their acquittals on the substantive counts demonstrate the insufficiency of the evidence against them on the conspiracy count. The acquittals at most indicate inconsistency in the jury's verdict, which is not by

itself grounds for reversal, *Dunn* v. *United States*, 284 U. S. 390 (1932); see *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960). The inconsistency here was not irrational, since the jury could have believed that Schawartzberg and Kahn, while working together with Pacelli, did so at his bidding and were correspondingly less culpable.

The evidence as to Pacelli's membership in the conspiracy was also sufficient to go to the jury. The jury properly could have found not only that Pacelli was working with Schawartzberg and with Schawartzberg's employer Kahn in an effort to keep Hedges quiet, but also that their joint efforts lasted up until the time Hedges began to testify before the grand jury. See *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir.), *cert. denied*, 316 U. S. 678 (1942).

Pacelli contends that the evidence against him on the substantive count was insufficient as a matter of law, since at the time involved in that count—January 9, 1963—there was no pending proceeding in which Hedges was to testify. See *Pettibone* v. *United States*, 148 U. S. 197, 207 (1893); *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). We need decide neither the correctness of *Scoratow* nor its application to a case in which the potential witness has actually agreed to testify. Pacelli's sentence on the substantive count was concurrent and of the same length as his sentence on the conspiracy count, and we conclude, for reasons set out elsewhere in this opinion, that his conviction on the conspiracy count should be affirmed. See *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Benjamin*, 328 F. 2d 854, 856 (2d Cir.), *cert. den.* sub nom. *Howard* v. *United States*, 377 U. S. 953 (1964).

We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the

Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants.

2. *The Motions for Severance.*

Each of the appellants attack the denial by the trial court of his or her motion for a severance. Pacelli contends that the trial court should have severed the case as to him because he was prejudiced by the testimony of Kahn during the presentation of her defense, which tended to establish a link between Kahn and Pacelli which had been supplied only inferentially in the Government's case. This did not by itself require the trial court to sever Pacelli's case, see *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2d Cir.), *cert. denied* sub nom. *Legere* v. *United States,* 379 U. S. 828, 859 (1964), particularly since Kahn's testimony in no way indicated that she worked together with Pacelli in attempting to keep Hedges quiet. Pacelli also maintains that he was prejudiced by his codefendants' arguments that the whole case was an unfair attempt by the Government to destroy Kahn as a lawyer, since the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made by Schawartzberg and Kahn. We believe that the danger of prejudice to Pacelli from his codefendants' position was far too remote to require severance. The jury could presumably keep separate the positions of the three defendants in this relatively short and

simple trial. Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 930-31 (2d Cir.), *cert. denied* sub nom. *Ormento* v. *United States*, 375 U. S. 940 (1963).

Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to call witnesses. Their position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged, *Johnson* v. *United States*, 318 U. S. 189, 195 (1943); McCormick, Evidence §131 (1954), whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous, *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), *cert. denied*, 374 U. S. 829 (1963); *Olmstead* v. *United States*, 19 F. 2d 842, 847-48 (9th Cir. 1927), *aff'd*, 277 U. S. 438 (1928), at least in the absence of anything in this record indicating that the co-defendants would have given exculpatory evidence, see *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965).

3. *The Charge on Conspiracy.*

The trial court's instructions as to the law of conspiracy, attacked by Pacelli as not adequately focusing the attention of the jury on the questions whether the evidence established one conspiracy or many and whether Pacelli was a knowing member, were entirely proper in the context of this case. The court not only instructed the jury that it had to find that the conspiracy existed as charged in the indictment, but also that the defendants knowingly associated themselves with the conspiracy and that each defend-

ant's association with the conspiracy had to be determined only from evidence as to that defendant's own acts, declarations, and conduct. See *United States* v. *Stromberg,* 268 F. 2d 256, 264-65 & n. 10 (2d Cir.), *cert. denied,* 361 U. S. 863, 868 (1959).

4. *The Conduct of the Prosecution.*

At several of the interviews between Kahn and Hedges while the latter was in prison, electronic equipment was placed with the consent of Hedges both on Hedges and around the room in an effort to record the conversations between the two. The resulting tapes were not particularly intelligible, since Kahn carried a portable radio with her on her visits and turned it up whenever she had anything important to say.

Appellants' pre-trial motions to suppress these tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. Kahn and Schawartzberg contend that the prosecutor hinted at the existence of the tapes in his summation, when, after Kahn's counsel had pointed to Kahn's candor in testifying about the offer of money to Hedges, the prosecutor said, "Do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise?" This brief remark, improper though it was, did no more than suggest the possession of further proof by the Government, if indeed it did that much: Hedges had testified for the Government as to the offer. Even if the tapes were unconstitutionally obtained, this fleeting reference did not amount to the use at trial of unconstitutionally obtained evidence. Cf. *United States* v. *Guerra,* 334 F. 2d 138 (2d Cir.), *cert. denied,* 379 U. S. 936 (1964).

Nor should the trial court have dismissed the indictment because of the possibility that the tapes might have been played before the grand jury. Even if the tapes were illegally obtained, their admission before the grand jury would not justify the relief requested unless the defense was able to show that the indictment rested solely on incompetent evidence. See *Costello* v. *United States,* 350 U. S. 359 (1956); *Lawn* v. *United States,* 355 U. S. 339 (1958); *Cochran* v. *United States,* 310 F. 2d 585, 590 (8th Cir. 1962). Here, both Hedges and his wife Patricia testified before the grand jury, and their testimony was both competent and ample grounds for the indictment.

Kahn maintains that the conduct of Hedges amounted to entrapment. She requested no charge on entrapment at trial, and was entitled to none. There is no testimony in the record which suggests that Hedges ever asked for money for his wife or himself in return for not testifying.

Kahn and Schawartzberg contend that the use of Hedges, if not entrapment, was so offensive that this court should reverse the convictions resulting from this use in the exercise of its supervisory power over the machinery of federal justice and law enforcement. Appellants find it particularly heinous that Hedges never told Kahn that he was no longer her client, and seek to show that the Government somehow abused the attorney-client privilege. However, the attorney-client privilege is not involved. That privilege is the client's, not the attorney's; and in any case, it does not extend to advice from the attorney in furtherance of a crime. McCormick, Evidence §96, §99 (1954). Nor is the use of Hedges in some other fashion offensive. As we have seen, he did not solicit bribes from Kahn; she came to him with offers of bribes and with veiled threats that he better not testify.

Kahn also urges upon us as grounds for reversal the alleged misconduct of an Assistant United States Attorney for the Southern District of New York. According to Kahn, Hedges admitted to this Assistant United States Attorney that he had been involved in the narcotics activity for which he had been convicted in Connecticut. This admission was made while Hedges was appealing from his Connecticut conviction, partly on the grounds of the insufficiency of the evidence against him. We fail to see how Hedges' right to challenge the sufficiency of the evidence against him was affected by his post-trial admission of guilt; or what the receipt of the post-trial admission, which apparently did not exculpate any of the codefendants, obliged the Assistant United States Attorney to do. In any event, the matter is entirely irrelevant to the present appeal.

5. *Rulings During the Course of Trial.*

Appellants contend that a variety of the rulings of the trial court were erroneous. Kahn argues that the attorney-client privilege was improperly invoked to prevent her from describing the legitimate objectives of her many visits to Hedges in prison, and that this restriction made it seem that she visited Hedges only for illicit purposes: suborning perjury or trying to prevent him from testifying. However, as the Government makes clear in its brief, Kahn herself suggested that she should not go into the nature of the topics discussed with Hedges. She hardly can object to a ruling she invited and did not object to when made.

Kahn and Schawartzberg contend that Hedges should not have been allowed to invoke his privilege against self-incrimination when questioned about the details of crimes, the commission of which he already had admitted. We do

not think it was reversible error to prevent defense exploration of the details of the crimes on cross-examination. Hedges may well have waived his privilege against self-incrimination by admitting commission of the crimes, but Kahn and Schawartzberg had already gotten most of the benefit they were going to get out of the crimes by virtue of Hedges' admission. His admission at once undermined his own credibility and indicated a legitimate lawyer-client reason for the many visits by Kahn to Hedges in prison. Exploration of the details of the crimes would have been largely superfluous. See *United States* v. *Irwin,* 354 F. 2d 192, 198 (2d Cir. 1965); *United States* v. *Owens,* 263 F. 2d 720, 722 (2d Cir. 1959).

Appellants also contend that the court should not have permitted the jury to be present when the Jencks Act material was being marked for identification. Perhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, see *Johnson* v. *United States,* 347 F. 2d 803, 806 (D. C. Cir. 1965); but this taken by itself is not sufficient grounds for reversal. See *Roberson* v. *United States,* 282 F. 2d 648, 650-51 (6th Cir.), *cert. denied,* 364 U. S. 879 (1960).

6. *Conclusion.*

We have carefully considered each of the remaining assignments of error put forward by the appellants, and find them devoid of merit. The convictions are accordingly affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHWARTZBERG,
and VINCENT PACELLI,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHAWARTZBERG,
Defendants-Appellants.

Appendix C

A petition for a rehearing in banc having been filed herein by counsel for the appellants pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Ninth amendment of the Constitution of the United States provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

APPENDIX E

Statutes Involved

Title 18, U.S.C.A. §2 provides:

Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, U.S.C.A. §371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §401 provides:

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §1503 provides:

Influencing or injuring officer, juror or witness generally

Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official

duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Title 18, U.S.C.A. §1622 provides:

Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 774.

Title 18, U.S.C.A. §3500 provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject

matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the

trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

§738, Code of Criminal Procedure, New York State provides:

Eavesdropping

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes,

employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping.

§739, Code of Criminal Procedure, New York State provides:

Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs.

Appendix E

§740, Code of Criminal Procedure, New York State provides:

Punishment for eavesdropping

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years.

§813-a, Code of Criminal Procedure, New York State provides:

Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time

specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

APPENDIX F

Respective Orders of District Court Judges re Eavesdropping Tapes Reclarification

Re: United States v. Israel Schawartzberg
Ind. No. 65 Cr. 999

Nunc pro tunc as of January 6, 1966, 2:45 P.M., the parties were directed that the reclarification of the tapes will commence on January 11, 1966, at 10:30 A.M., at Manhattan Sound Corp., 420 West 56th Street, New York City, and continue thereafter without interruption until completed, from 10:30 A.M. to 4:30 P.M. each day.

During the reclarification, petitioner Israel Schawartzberg may have an expert present but the reclarification process shall proceed as above directed regardless of the presence of said expert.

Petitioner personally may not attend at the reclarification process. Agent Thomas J. Dugan of the Federal Bureau of Narcotics may not attend at the reclarification process.

The foregoing directions, made as aforesaid, are deemed dispositive of this motion, and it is so ordered. No further order is necessary.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, New York
January 10, 1966

[File endorsement omitted.]

The within motion to impound the tapes is denied, except that the defendant is permitted to have an expert present during the reclarification process.

So ordered.

(12/27/65)

/s/ CHARLES H. TENNEY

APPENDIX G

Order Denying Application to Cite Government For Contempt

February 3, 1966

The moving papers and the affidavit of Erwin Damsky, sworn to January 25, 1966, fail to disclose any disobedience by Howard L. Jacobs, William M. Tendy, Thomas J. Dugan or Norris Durham, of any order of Judge Tenney or Judge Sugarman, or of any misrepresentation by Howard L. Jacobs to Judge Sugarman.

Accordingly, the motion by defendant Schawartzberg "for an order citing" the said Jacobs, Tendy, Dugan and Durham "for Contempt of Court and for Obstructing Justice" is in all respects denied.

The said affidavit of Damsky will be forthwith referred to Judge McLean in connection with a motion by the government for further reclarification of the tapes, now pending before him.

It is so ordered. No further order is necessary.

/s/ SIDNEY SUGARMAN
U.S.D.J.

APPENDIX H

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of the Application for an Order Dismissing the Indictment for Want of Prosecution, or to Forthwith Arrest Movant ISRAEL SCHAWARTZBERG,

—against—

UNITED STATES OF AMERICA,

Respondent.

SIRS:

ISRAEL SCHAWARTZBERG, movant herein, duly sworn to the 1st day of November, 1965, and upon the Exhibits attached hereto in support thereof, the undersigned will move this Court at the United States Courthouse, Room 318, thereof, on the 8th day of November, 1965, at 10:30 A.M., for an Order directing the Government to dismiss the indictment heretofore found against movant, for want of prosecution and/or for unnecessary delay in arresting him and bringing him to trial, pursuant to Rules 47, 48 and 48(b) of the Federal Rules of Criminal Procedure, and the undersigned further moves for such other, further and different relief as may be just and proper in the interest of substantial justice.

Appendix H

Dated: November 1st, 1965
Bronx, New York City

Yours, etc.,

ISRAEL SCHAWARTZBERG
Movant Pro Se
Post Office Address
157 Field Place
Bronx, New York City, 10468

To:

HON. ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Respondent
United States Courthouse
Foley Square, New York, 10007

Clerk of above Court

APPENDIX I

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Misc. No. 18-65

UNITED STATES OF AMERICA,

Plaintiffs,

—against—

ISRAEL SCHWARTZBERG,

Defendant.

HONORABLE SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ISRAEL SCHAWARTZBERG, defendant herein, and upon the Complaint currently pending against said defendant in the above captioned matter, the said defendant will move this Court for an Order directing the attorneys for the Government to either dismiss the Complaint for lack of prosecution or to move this cause for a speedy indictment in order to afford defendant a speedy trial, pursuant to the Rules of the Federal Rules of Criminal Procedure; and the defendant will move for such; other, further and different relief as may be just and proper, on the 14 day of October, 1963, in Room 318, United States Courthouse, Foley Square, New York, on the opening of Court on said day or as soon thereafter as can be heard.

Appendix I

Dated: October 1st, 1963.
New York City, N. Y.

Yours, etc.,

ISRAEL SCHWARTZBERG
Defendant pro se
157 Field Place
Bronx 68, N. Y.

To:

HON. ROBERT M. MORGENTHAU
United States Attorney
Southern District of New York
Foley Square 7, New York

CLERK OF ABOVE COURT

APPENDIX J

Affidavit of Defense Electronic Expert Erwin Damsky in Support of Motion to Cite Prosecutors & Agents

---

[SAME TITLES]

SUPPORTING AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.:*

ERWIN DAMSKY, being duly sworn, deposes and says:

That I am the sound expert who was employed by the above named defendant to attend the reclarification process in compliance with the respective orders made by Judge SIDNEY SUGARMAN on January 6th and 10, 1966, by Judge CHARLES H. TENNEY on December 27th and 29th, 1965.

I did attend the reclarification process on January 11th, 1966, at which time Federal Bureau of Narcotics Agent NORRIS DURHAM was also present at the processing were three employees of Manhattan Sound Corp.

The processing commenced at about 10:20 and was concluded at about 6 P.M. on January 11th, 1966. The agreed procedure was for me to make copies of the Government's eavesdropping tapes between counselor FRANCES KAHN and her client CHARLES HEDGES. Then the Government was to make copies of said tapes simultaneously with the improvement of the clarity of sound. Then I was to make a copy of the reclarified tapes after the Government concluded their experiment. All this was done. Federal Agent

Appendix J

The Sealing Process

Norris Durham and I both agreed to simply *mark for identification* all boxes containing the three sets of tapes so as not to mix up the defense and Government tapes. While signatures and string appear on the respective boxes of tapes belonging to the Government and to the defense, these boxes of tapes were *not sealed.* Government Agent Durham and I placed all the boxes of tapes, consisting of three (3) bundles, in *one master carton* with string tied to it and this string was covered with three-inch sealing gummed tape across which was written the initials of both the Agent and myself. The Federal Agent and I agreed that this method of sealing the master carton was the sole and safest way to insure the non-tampering of the tapes while I am not present.

I have just been informed by the defendant, Israel Schawartzberg, that prosecutor Howard L. Jacobs broke the seal on the master carton and listened to the Government's tapes. This action, in my absence, is contrary to Federal Agent Durham's and my express agreement and the tapes are, in my opinion, now so tainted as to make it impossible for me to attend any other reclarification process because it is now possible that the tapes were altered, edited and tampered with in my absence and without giving notice to my employer, Israel Schawartzberg, and I. I will be glad to appear at a hearing if this honorable Court so desires.

Sworn to the 25th day of January, 1966.

/s/ Erwin Damsky

(Duly verified.)

Office-Supreme Court, U.S.
FILED
SEP 24 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 594

ISRAEL SCHAWARTZBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISRAEL SCHAWARTZBERG
Petitioner pro se
P. O. Address
157 Field Place
Bronx, New York 10468

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ISRAEL SCHAWARTZBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case July 18th, 1966.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, is not yet reported and is printed hereto as Appendix A, *infra.*

The opinion of the Trial Court (McLean, *J.*) denying petitioners' pre-trial motion to suppress eavesdrop recordings of conversations and its fruits, between co-petitioner Frances Kahn, an attorney and her client, Charles Hedges, in the Westchester County Jail was denied. It is reported as *United States* v. *Kahn, et al.* (S. D. N. Y. 1966), 251 F. Supp. 702. It is printed in the Supplemental Appendix of

co-petitioner Kahn appended to her brief before the Court of Appeals below. This opinion is reprinted in co-petitioner Pacelli's petition for certiorari under Docket No. 557 of this term before this Court as Appendix C therein.

An opinion relating to pre-trial motions of petitioners rendered by District Judge Tyler has not been reported and is also printed in co-petitioner Kahn's supplemental appendix attached to her brief to the Court of Appeals; nine copies thereof have been filed with the Clerk of this Court.

Two other opinions and orders made by two respective District Court Judges (Sugarman & Tenney, *JJ.*) are printed as Appendix F hereto, *infra,* regarding the Government's application to reclarify the eavesdropping tapes in this case; and petitioner's application to impound the tapes to prevent the prosecution from tampering with them. Another opinion and order by Judge Sugarman, denying petitioner's application to cite two prosecutors and two Federal Bureau of Narcotics Agents for Contempt and Obstruction of Justice is printed herein as Appendix G, *infra.*

Jurisdiction

The judgment of the Court of Appeals, Second Circuit (Appendix B hereto, *infra*) was made and entered July 18th, 1966. A petition for rehearing *in banc* was denied on August 26th, 1966 (Appendix C hereto, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C. §1254(1).

Questions Presented

1. Whether petitioner was deprived of his constitutional rights and a fair trial when:

a) petitioner was deprived of his right to a speedy trial by reason of the protracted pre-delay arrest and indictment;

b) petitioner was denied his right to cross-examine Narcotic Bureau Agent Walter Miller by the refusal of the Trial Court to order the agent's presence in Court for the purpose of determining whether Government witness Patricia Hedges had handed written notes to the agent which could have conceivably exculpated petitioner;

c) the Trial Court refused to conduct a *voir dire* examination regarding the notes of Government witness Patricia Hedges especially when both the Government and petitioner agreed to this *voir dire* examination in compliance with the Jencks Act;

d) the prosecutor's consecutive references to petitioner's failure to testify during petitioner's closing argument to the jury;

e) the improper remarks made by the prosecutor in his closing argument to the jury;

f) the prosecution informed the Trial Court it would use petitioner's previous embroilments with the law when petitioner offered to testify both in his own behalf and in his effort to give exculpatory evidence in behalf of co-petitioner Kahn;

g) the Grand and Petit jurors in the Southern District of New York are not qualified unless they believe in a Supreme Being;

h) the prosecution wrongfully and improperly presented the Jencks Act material in the jury's presence with the concurrence of the Trial Court and over petitioner's objection;

i) in light of the Massiah-Escobedo doctrine, any exculpatory and inculpatory statements gleaned from the eavesdrop tapes, as respecting co-petitioner Kahn and Charles Hedges, should have been excluded at the trial since the inquiry focused upon her June 1962, long prior to arrest;

j) petitioner's pre-trial denial of his motion for a change of venue was an abuse of discretion;

k) petitioner's pre-trial denial of his motion for a severance was an abuse of discretion;

l) the evidence adduced at the trial was insufficient to sustain the conviction;

m) petitioner's pre-trial denial of his motion for the suppression of the eavesdrop tapes and its fruits was error and an abuse of discretion.

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth, Fifth, Sixth and Ninth Amendments and are printed herein as Appendix D, *infra.*

Statutes Involved

The Federal and New York State statutes involved are adequately set forth in Appendix E hereto, *infra.*

Statement

In order to avoid duplicity and not to belabor this Court, petitioner has read co-petitioner Kahn's petition for certiorari and can add the following. Petitioner, a law clerk, in the employ of co-petitioner Kahn for about seven years and certified as a law clerk by the New York State Court of Appeals, was first arrested by prosecutor William M. Tendy in June of 1962 on a charge of Obstructing Justice in violation of Title 18, U. S. C. §1503. It was alleged in the Complaint numbered M 18-65 in June, 1962, that the jury returned to the courtroom to view exhibits in the case then being tried and reported on appeal as *United States* v. *Bentvena* (2 Cir. 1963), 319 F. 2d 916. Whereupon, prosecutor Tendy dispatched one of his Narcotic Bureau Agents to interview co-petitioner Kahn at the hospital where she was confined as a patient, as a result of injuries which she sustained by stepping into a hole on a sidewalk during the Bentvena trial wherein she represented another defendant.

Co-petitioner Kahn advised the agent that the desired exhibits were in her law office. Prosecutor Tendy telephoned the law office and gave his message to the answering service to the effect that petitioner should contact the prosecutor as soon as possible. Co-petitioner Kahn was substituted by assigned counsel when the Bentvena trial had resumed. Petitioner did not contact prosecutor Tendy as soon as requested. Shortly after the conclusion of the Bentvena trial, which resulted in a guilty verdict as to co-petitioner's client, petitioner telephoned the prosecutor in response to the message left by him with the answering service. Prosecutor Tendy requested petitioner to come to the Federal Courthouse at Foley Square in Manhattan. Petitioner was then forth-

with subpoenaed to appear before a Grand Jury in the same building. Petitioner answered every question except as to the name of the married woman with whom he had spent his time. Petitioner was approached by two federal narcotic agents after his exit from the Grand Jury room and was propositioned by them to the extent that if they could obtain information stating that co-petitioner Kahn purposely fell and hurt herself so as to be relieved of the protracted Bentvena trial, they would not arrest petitioner for obstructing justice. Petitioner rejected their proposition.

Prosecutor Tendy then ordered petitioner arrested for Obstruction of Justice. After numerous delays were requested by the prosecutor, a hearing was eventually held before Commissioner Bishopp on December 17, 1962, at which time prosecutor Tendy testified and petitioner appeared *pro se*. (Petitioner has a certified copy of the transcript of the minutes in connection with his 1962 arrest and can present it to the Clerk of this Court for distribution to the Court if so desired.) Petitioner was bound over to the Grand Jury for indictment on January 3rd, 1963. Thereafter, petitioner was never indicted for the alleged crime and after multiple applications to dismiss the complaint for lack of speedy trial, etc. (see Appendix I hereto, *infra*) District Judge McGohey dismissed the Complaint, by consent of the prosecution, on October 14, 1963.

It is significant to note there was testimony at the instant trial:

a) That Charles Hedges began his cooperation, feigned or otherwise, with the Government in June, 1962;

b) That petitioner subsequently gave Patricia Hedges $3,000 to put into a bank to use as collateral in July, 1962 to bail out her husband;

c) That petitioner met Patricia Hedges on January 9, 1963, and allegedly approved a bribe offer by co-petitioner Pacelli to Mrs. Hedges;

d) That there were telephone calls to Patricia Hedges by petitioner January 14, 1963.

It must be borne in mind that as late as October 14, 1963, the Complaint charging Obstruction of Justice was dismissed against petitioner by Judge McGohey. From the trial testimony it is undisputable that petitioner was under investigation herein as far back as June, 1962, on the instant case of obstructing justice and subornation of perjury and conspiracy to do so. Prosecutor Tendy has repeatedly warned petitioner he would wipe the smile off his face. There was a running feud between petitioner and Mr. Tendy. Co-petitioner Kahn is the innocent victim of Mr. Tendy's machinations, who had set his sights on petitioner to undermine the lawyer-employee relationship then existing between counselor Kahn and petitioner.

Prosecutor Tendy is described as a high school dropout in *The Deadly Silence, Buse;* at p. 204. This Court cannot imagine how paranoically ferocious prosecutor Tendy really is. It was co-petitioner Kahn who obtained the reduction in sentence for her client Charles Hedges, only to have prosecutor Tendy and Federal Narcotic Agent Thomas J. Dugan inform Hedges that it was they, not counselor Kahn, who effected the reduction from fifteen to five years. District of Connecticut Judge Timbers directed Agent Dugan to communicate with co-petitioner Kahn or her client Hedges to make a formal motion for a reduction of sentence and that the Court would grant

it (after Hedges' appeal was affirmed by the Court below on March 21, 1963 (*United States* v. *Cianchetti, et al.* (2d Cir. 1963), 315 F. 2d 584)) (1412a-1413a).*

Co-petitioner visited Hedges in Westchester County Jail on April 20, 1963, at which time he had decided to cooperate with Agent Dugan and prosecutor Tendy to the extent of having his sentence reduced. Hedges then requested counselor Kahn to prepare and submit a motion for reduction of his sentence. The motion for the reduction of sentence is now Kahn's Exhibit "S" in evidence.

Neither Hedges nor Agent Dugan ever told co-petitioner Kahn of the agent's interview with Judge Timbers, for the agent distorted Judge Timber's assurance of a reduction into one of compensation in return for Hedges' testimony against petitioners. Since petitioner was unable to visit Hedges in jail, the prosecution and Agent Dugan enveloped counselor Kahn in order to arrest petitioner with their concocted story involving co-petitioner Kahn. The reduction of sentence from 15 to 5 years was granted by Judge Timbers in Connecticut on May 15, 1963.

While the Trial Judge McLean spread on the record (1410a-1413a) that his honor's neighbor, Judge Timbers, had directed Agent Dugan to notify counselor Kahn or client Charles Hedges, to have a motion submitted for a reduction of sentence to Judge Timbers, Agent Dugan not only refused to inform co-petitioner thereof but the agent lied on the stand at the Pacelli narcotics trial when he denied ever telling Hedges of Judge Timbers' direction (R 3333-3334),** Docket No. 527, October 1966 Term, also pending before this Court. It was Hedges who was

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* Numerals in parentheses followed by letter "a" refers to Appellants' Joint Appendix.

** Refers to pages of Pacelli's other trial record.

the first to tell counselor Kahn to move for a reduction of sentence after Agent Dugan had imparted Judge Timbers' suggestion for a formal motion to Hedges.

The record discloses that Agent Dugan visited Hedges at least 105 times in the Westchester County Jail and brought Hedges and his wife Patricia to the United States Courthouse to speak to prosecutor Tendy on many occasions. Obviously this was done to coach the Hedges regarding petitioner and co-petitioner Kahn. Although Agent Dugan was the prime mover as to Hedges' testimony at the instant trial, he deliberately abstained from testifying for the Government against petitioner and co-petitioner Kahn at the trial. Agent Dugan spent many hours listening in to Hedges' conversations with counselor Kahn at the jail. Yet, Agent Dugan couldn't come forward with one scintilla of incriminatory eavesdropping evidence against counselor Kahn. There was no reason for incriminating statements to be made by co-petitioner Kahn. Hedges purposely mentioned on the tapes that a $25,000 bribe offer had been made to him by others since his reimprisonment. Petitioner and co-petitioner Kahn can thank Hedges' cousin, another special employee named James Godwin, for alerting petitioners to the imminent danger of doctored tapes which impelled petitioner to move the District Court to impound the tapes. The motion was denied but the Court permitted petitioner to have his expert present during the Government's reclarification of the tapes. To put it mildly, the agents and prosecutors were caught with their hands in the cookie jar as a result of Godwin's tip-off to petitioner. The very same day this judgment was affirmed by the Court below, the prosecutor moved the Court with unusual avidity to imprison co-petitioner and petitioner on the ground that certiorari will be denied by this Court. Every practicing

attorney having legal business with prosecutor Tendy is called into his office when he represents a defendant in a narcotic case.

Reasons for Granting the Writ

a) *Pre-Trial Motions:*

Petitioner traveled to Israel on vacation in September of 1965. There, the authorities informed petitioner they received a communication from prosecutor Tendy that petitioner was in Israel for ominous reasons. During petitioner's subsequent attempt to land in London he was informed by Special Branch, Scotland Yard, that prosecutor Tendy had requested petitioner's forthwith return to the United States to be arrested for "perverting the cause of justice". Petitioner returned here but wasn't arrested. The following day petitioner sent prosecutor Tendy a telegram requesting why he had informed European authorities that he desired to arrest him. Failing to receive a reply, petitioner moved the District Court (Tyler, *J.*) for a speedy trial or to be arrested; said motion was made returnable November 8, 1965 (Appendix H annexed hereto, *infra*). Petitioner also complained there was an unnecessary delay in arresting him and bringing him to trial" (R 696-818).* On the return day of the motion petitioner was indicted along with co-petitioners Kahn and Pacelli under No. 65 Crim. 999 in the Southern District of New York.

Petitioner and co-petitioner Kahn then submitted respective moving papers requesting, *inter alia,* a change of venue and a severance (R 11-44). Subsequently, co-peti-

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* Papers not included in Appellants' Joint Appendix will be cited under the designation "R" as page numbers of the Record on Appeal docketed in the Court of Appeals, Second Circuit.

tioner Pacelli also submitted pre-trial motion papers seeking the same type of relief (R 49-66). It was agreed in open Court that each petitioner would adopt the other's branches of motions as may be applicable to one another (R 821). The motions were decided by Judge Tyler in an unreported opinion (R 130-149). This opinion was printed in co-petitioner's supplemental apendix for the Court below from "S17a" to "S26a" inclusive. It must be borne in mind that the Court (Tyler, *J.*), was infected by adverse publicity attendant in an unrelated case regarding petitioner and Miss Kahn since the Court wrote that petitioner, co-petitioner Kahn "and others are charged with conspiracy to transport women from New York to the Hudson County Jail in New Jersey for immoral purposes" (see "S22a", *ibid.*). Once the tribunal itself became infected by the widespread adverse publicity about petitioner, there was no need for petitioner to question the panel of jurors at the forthcoming trial. How can petitioner avail himself of a fair trial by jury when the Court has allowed the tainted publicity to seep into its eyes and ears and to erroneously state that petitioner and co-petitioner Kahn are charged in the District Court with another conspiracy?

Petitioners' motions for severances were arbitrarily denied and its discretion was abused.

Pacelli moved the Court for a severance of trial stating (R 49-59):

> "Schawartzberg may be a potential witness whose testimony the defendant Pacelli may require. . . ."

In *United States* v. *Echeles* (7 Cir. 1965), 352 F. 2d 892, the Court reversed a conviction of an attorney, who was sentenced for conspiracy and impeding the administration of justice, on the ground that it appeared in the trial

of the attorney that he would be unable to call his client who was a co-defendant to the witness stand for the purpose of getting into evidence his client's prior statements holding the attorney blameless.

In the case at bar, petitioner was unable to be called to the witness stand in behalf of co-petitioner Kahn, his lawyer-employer. Co-petitioner Kahn was the occupant of what has been termed the "uneasy chair" generally reserved for co-defendants in a conspiracy trial. *Krulewitch* v. *United States* (1949), 336 U. S. 440.

Petitioner has consistently maintained his innocence and especially asserted co-petitioner's innocence. It is to be noted that petitioner averred in his pre-trial moving papers, as follows (40-41):

> ". . . Even your deponent was propositioned to testify falsely against his lawyer-employer in an unrelated Federal Grand Jury investigation and because deponent rejected the Federal Bureau of Narcotics proposal the prosecution arrested deponent on a charge of obstructing justice but the Complaint was dismissed . . .".

Furthermore, in petitioner's opening to the jury he stated that there was a conspiracy on the part of a few narcotics agents and prosecutors "to destroy Miss Kahn as a lawyer" (11a). Petitioner added by requesting the jury not to "be part of their conspiracy to destroy Miss Kahn" (Tr. 37).

At the time of sentence petitioner advised the Court that two narcotic agents "spoon-fed" him words to incriminate co-petitioner Kahn. Petitioner further stated that "Miss Kahn is innocent of any charges" (Tr. 1906). From all of the foregoing it becomes increasingly clear that petitioner could have testified under oath in behalf of co-petitioner

Kahn which would have exculpated her of any blame. Moreover, District Judge Tyler, on oral argument during the motions for a severance, stated (853):

> ". . . it might be a good idea to sever the matter because the trial of all three would be such an unabashed donnybrook that nobody would get a fair shake, including the United States, no matter what the trial judge tried to do."

The prosecutor objected to the severance and stated that this would mean three separate trials (855). Judge Tyler later said that there may be something to the severance motions "if we could be assured that we could get all three or two cases tried with relative dispatch, which I think we might" (856). Had the motions for severances been granted, co-petitioner Kahn would have enjoyed the benefit of petitioner's sworn testimony subject to cross-examination.

Also, at sentence time, petitioner said (Tr. 1906):

> "I say again I am innocent and *certainly Miss Kahn is innocent* of any changes." (Emphasis supplied)

From all of the foregoing, petitioner would have testified in co-petitioner's behalf and offered her much exculpatory evidence had the severance been granted.

b) *The Other Errors:*

Regarding the tainted eavesdropping and fruit of the poisonous tree, petitioner respectfully notes:

The cases allowing the consent of one party to the conversation to permit eavesdropping are *contra* to several decisions, headed by the *Polakoff* case,[1] which require the

[1] *United States* v. *Polakoff*, 112 F. 2d 888 (2nd Cir. 1940), *cert. denied*, 311 U. S. 653, 61 S. Ct. 41, 85 L. Ed. 418 (1940).

consent of both parties. The *Polakoff* case concerned a conviction for conspiracy to obstruct justice. In reversing the conviction, the court stated:

> "Anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts * * * It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk." [2]

A later case involved a prosecution for the sale of illegal narcotics.[3] The court held that even if the informer consented to a policeman's listening on an extension to a conversation with the defendant, it would still be a wrongfully intercepted conversation. The defendant was the "sender" of his part of the conversation and therefore, he too, would have to consent to the eavesdropping.

The court in *United States* v. *Hill*[4] followed the *Polakoff* case, announcing that the use of the microphone, without the consent of both parties to the conversation, whether it actually touched the receiving part of the phone or was held in close proximity to it, was an interception of the telephone communication in violation of the *Federal Communications Act*. *United States* v. *Stephenson*, 121 F. Supp. 274 (D. Col. 1954), also followed *Polakoff*.

In a habeas corpus proceeding, it was held that special agents of the sheriffs' office, who lowered a microphone into a portion of the ventilating shaft which was between

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[2] *Accord*: *United States* v. *Fallon*, 112 F. 2d 894 (2nd Cir. 1940), *cert. denied*, 311 U. S. 653, 61 S. Ct. 41, 85 L. Ed. 418 (1940).

[3] *Sullivan* v. *United States*, 219 F. 2d 760 (D. Col. Cir. 1955).

[4] *United States* v. *Hill*, 149 F. Supp. 83 (S. D. N. Y., 1957).

the floor and ceiling of the apartment, violated the Fourth Amendment rights of those in the apartment when their conversations were overheard by means of electronic eavesdropping.[5] The court held the ventilating shaft was a part of the apartment and therefore, an unlawful physical invasion occurred.

Two recent Federal District Court decisions, one in Texas,[6] and one in New York,[7] have reached opposite conclusions in what could be a fertile field for electronic surveillance. The Texas decision involved a proceeding on the accused's motion to suppress certain evidence. A small microphone transmitter had been secreted in a public telephone booth, and through its use evidence had been obtained against the defendant. Upon considering whether eavesdropping by means of an electronic device placed in the booth without the knowledge of the defendant was a search and seizure in violation of the Fourth Amendment, the court stated:

> "In the light of technological improvements, it is clear that an electronic device placed in a protected area by government agents without the knowledge of the defendant is as much a physical trespass and violation of the right to privacy as is the making of an unlawful physical entry, and overhearing the conversation under such circumstances is a violation of the Fourth Amendment."

The *Lanza* case,[8] though not involving the accused's right to counsel, opened the door for the objection. An electronic

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[5] *Cullins* v. *Wainwright,* 328 F. 2d 481 (5th Cir. 1964), *cert. denied,* 379 U. S. 845, 85 S. Ct. 33, 13 L. Ed. 2d 50 (1964).

[6] *United States* v. *Stone,* 232 F. Supp. 396 (N. D. Tex. 1964).

[7] *United States* v. *Borgese,* 235 F. Supp. 286 (S. D. N. Y. 1964).

[8] *Lanza* v. *State of New York,* 370 U. S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962).

device was installed in the visiting room of the Westchester County Jail where the defendant's brother visited him. Without their knowledge their conversation was thereby overheard and transcribed by jail officials. In overruling the defendant's contention of a violation of his Fourth Amendment rights, the court said, in effect, that the Sixth Amendment was not raised in the *Lanza* case, nor was it applicable since counsel was not involved.

Ancillary to legal and illegal electronic surveillance is the doctrine of "fruit of the poisonous tree." This doctrine was judicially conceived in the second *Nardone* case.[9] The result of the new trial was again reversal, but was due to the injection of the "fruit of the poisonous tree" doctrine. The court said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

In other words this Court said that the illegally-obtained evidence should not be used to glean other evidence.

Hedges testified that in the beginning of September 1963, Agents Dugan and Durham installed electronic devices on his person and underneath the desk of the counsel room at the Westchester County Jail (A21a).[10] He signed an affidavit on September 20, 1963, consenting to the eavesdropping (A22a) between him and co-petitioner Kahn. On cross-examination he testified there still is a gun charge pending against him "now" (A24a). He spoke to co-

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[9] *Nardone et al.* v. *United States*, 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

[10] Numerical references preceded by "A" refer to the Motion to Suppress hearing prior to trial and is set forth in the beginning of Appellants' Joint Appendix.

petitioner Kahn about the gun charge but stated "it was not a consultation" (A25a). He testified he was carrying the gun when he was shot. He discussed it with co-petitioner Kahn at the hospital.

Hedges further testified he prepared legal documents to confer and consult with counselor Kahn but "with the knowledge of the Government" (A28a). He added he deceived co-petitioner Kahn by letting her believe she was his lawyer (A28a). He prepared these typed papers in 1964 (A30a). He informed counselor Kahn he "wanted to get away from William Tendy". He deceived counselor Kahn "with the Government's knowledge (A30a). He added "Not particularly Mr. Tendy, but away from the U. S. Government" (A31a). He never told counsel she was no longer his attorney (A32a). He stated that both Agent Dugan and prosecutor Tendy knew of the spurious motion he typed to deceive her (A33a).

Agent Dugan testified he made four recordings (A40a). There was an eavesdropping order and affidavit obtained September 20, 1963, which was effective until November 20, *1963* (A41a). He testified he worked by himself on the Kahn-Hedges investigation (A42a). He eavesdropped with Agent Durham on the first day and listened by himself the second time. The dates of the three eavesdropping incidents are October 6, 1963, September 27, *1964* and October 13, *1964* (A43a). He did not request assistance of Deputy Sheriff Arthur Thela or of Federal Bureau of Narcotic Agent Selvaggi to eavesdrop, because he used Agent Durham (A44a). He first learned that Agent Selvaggi also attempted to eavesdrop on the Kahn-Hedges conversations a month later (A45a). He said he thought it was prosecutor Tendy who may have informed him thereof (A45a).

Prosecutor William M. Tendy testified he was in charge of the Kahn-Hedges investigation and case (A50a). He was first informed the day previously that Agent Selvaggi had also eavesdropped on co-petitioner's attorney-client conferences with Hedges in the Westchester County Jail (A52a). He further testified the eavesdropping order was obtained upon the affidavit of Westchester County Assistant District Attorney McGuire, not upon Charles Hedges' affidavit of September 20, 1963 (A53a).

One of petitioner's pre-trial motions (22, 41) was for a dismissal of the indictment upon the ground that the Grand Jurors were required to take an oath to a belief in a Supreme Being as a qualification for service. Petitioner has thereby been denied the equal protection of the law as guaranteed by the United States Constitution. It has been held that a selection of Grand Jurors who were required to show their belief in existence of God was violative of this clause and was not a mere harmless irregularity. *State* v. *Madison* (1965), 213 A. 2d 880, 240 Md. 265. Cf. *Schowgurow* v. *State* (1965), 213 A. 2d 475, 240 Md. 121; *Smith* v. *State* (1965), 214 A. 2d 563, 240 Md. 464; *Schiller* v. *Lefkowitz* (1966 Md.), 219 A. 2d 378; cf. *United States* v. *Seeger, et al.*, 380 U. S. 163 (1965). The record does indicate that upon being accepted as jurors in this trial, the jury collectively swore by God to discharge their duties as jurors (901, 955).

During petitioner's summation to the jury, he was interrupted by the prosecutor who injected the following prejudicial and inflammatory comment on his failure to testify in his own behalf (556a):

> "Mr. Jacobs: Objection, your Honor. There is no testimony in the record, and Mr. Schawartzberg is not going to *testify* at this point.

"The Court: Sustained. Stick to the record, Mr. Schawartzberg.

"Mr. Schawartzberg: Charlie Hedges—Charlie Hedges told me—

"Mr. Jacobs: Objection. Mr. Schawartzberg cannot *testify* as to what Charlie Hedges—"

Petitioner, who functioned as his own counsel and did not testify, was seriously prejudiced by the prosecutor's prejudicial and inflammatory comment on his failure to testify. In *Stewart* v. *United States,* 366 U. S. 2, 81 S. Ct. 941-942, this Court remarked as follows:

> "The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' To protect this right Congress has declared that the failure of a defendant to testify in his own behalf 'shall not create any presumption against him.' Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted."

A comparable case is *United States* v. *Curtiss* (2d Cir. 1964), 330 F. 2d 278, 281 wherein Judge Marshall, speaking for the majority of the Court said:

> "Appellant's summation as his own attorney did not constitute a waiver of his Fifth Amendment protection. Nor could it be used as an excuse to disregard the admonition against 'comment or argument about his failure to testify.'. The government contends that defendant's efforts to argue his case in summation with facts outside the record 'left the Assistant United States Attorney no alternative except to let these argu-

ments go unanswered or to answer them in his summation.'"

Also, see, *United States* v. *Knox Coal Company* (1965 3 Cir.), 347 F. 2d 33, 44-46.

In mid-trial petitioner requested the prosecution to represent they would not cross-examine him with respect to his prior criminal record for he desired to take the stand and testify. The prosecutor refused to enter into any such stipulation or agreement (431a). The Court stated that the prosecutor was permitted to interrogate petitioner for purposes of credibility. In effect, due to petitioner's prior brushes with the law, which had nothing to do with the case at bar, he was thereby bludgeoned into refraining from testifying.

Petitioner's character or credibility was not in issue for he did not call any witnesses in his behalf. Accordingly, the prosecution had no right to blackjack petitioner from taking the stand to testify by stating it would cross-examine petitioner regarding his prior convictions. This was a violation of the Fifth Amendment.

Under the Fifth Amendment petitioner was entitled to testify. In *State* v. *Hawthorne* (1966 Essex Co. Ct.), 90 N. J. Super. 545, the Court suppressed a defendant's criminal record thereby allowing him to testify, on the grounds that the convictions were remote and that their probative value for impeachment purposes was far outweighed by the prejudicial effect they would have on defendant's rights. The use of previous convictions of a crime as a test for veracity has been subject to a great deal of criticism because there is no question but that it often creates suspicion and prejudice beyond its truth-testing value. It is particularly harmful when the accused is a witness. The jury may use it beyond its lawful purpose by predicting

that the accused must be guilty in the case being tried because he has been convicted before. When used against the accused to test his credibility, which can ordinarily be done if he takes the witness stand and testifies, it is very difficult to prevent its effect on the issue of probability of the commission of the crime for which he is charged in spite of the most careful instruction which the Trial Court may give. Cf. 78 Harvard L. Rev. 441 (1964); 70 Yale Law Journal 763 (1961); and Not Guilty by Judge Jerome Frank, pp. 111-115 for a discussion of juries' failure to follow a Judge's limiting charge on use of prior convictions; McCormick on Evidence, §43, p. 94 states, "On balance it seems that to permit * * * one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution"; cf. *Luck* v. *United States,* 121 U. S. App. D. C. 151, 348 F. 2d 763, 768-769 (D. C. Cir. 1965); 98 C. J. S. Witnesses §507 at 412 dealing with remoteness of conviction; 1 Wigmore, Evidence §194 (1940). Dean Griswold of Harvard Law School, writing for the American Bar Association Journal in V. 51, November 1965 issue "The Long View" stated, at 1021:

> "The man with a prior criminal record in this country is far more at the mercy of the authorities—police and judicial—than seems to me to be warranted. He may have learned his lesson and have gone straight as an arrow since his release. But he is an immediate suspect for future arrest. He can take the stand * * * in which case he is very likely to be convicted. Or he can refuse to take the stand * * * in which case he is also very likely to be convicted. Ought we not * * * undertake to develop procedures * * * to bring out the truth about the crime now charged, not some prior crime?"

Patricia Hedges testified that Federal Agent Miller took out a pad and wrote everything she told him about the meeting which ensued on January 9th, 1963, in the office building where she was employed (373a-374a). She handed all her notes to Agent Miller, especially one note which stated that petitioner asked her to memorize a letter to her husband (375a). This note coupled with Agent Miller's notes were not produced in accordance with the Jencks Act (376a). Whereupon petitioner requested the Government to produce the notes she wrote but the Government represented they did not have it. In fact, the prosecutor requested a *voir dire* on this demand to produce (379a). Prior thereto at the side bar, petitioner urged the Court for production of the notes regarding Agent Miller. Petitioner stated, "on the 3500 material we didn't get any of those notes" (378a). Evidently petitioner desired Agent Miller's notes as well. The Court denied both applications for the *voir dire*. Such statements were held producible in the following cases: *Williams* v. *United States* (1964, App. D. C.), 338 F. 2d 286, 5 ALR 3d 746; *United States* v. *Waldman* (1958, D. C. N. J.), 159 F. Supp. 747; *United States* v. *McKeever* (2 Cir. 1959), 271 F. 2d 669 where the Court, in holding that the exclusion by the District Court, without *voir dire* examination of the F. B. I. Agents, of some of their reports of interviews with Government witnesses, was error.

It was incumbent upon the Court to conduct an inquiry to determine whether or not the conditions of the Jencks Act were satisfied. The inquiry should have involved an interrogation of Agent Miller, not of the prosecutor. Petitioner kept reminding the jury that Agent Miller was mysteriously missing (Tr. 1642). The surveilling agents of January 9th, 1963, spoke to Agent Miller as recently as a week prior to their testimony (299a). If Agent Miller

would have testified with respect to the missing report, it could conceivably have exonerated petitioner of the conspiracy count because Patricia Hedges wrote that report while the meeting was still fresh in her mind and certainly written prior to her later reports on January 9th, 1963 (after Agent Dugan had contacted her). In *Hilliard* v. *United States* (CADC 1963), 317 F. 2d 150, the Court of Appeals held that the failure of a Trial Judge to conduct an examination into the existence of a statement by a Government witness, after the defense had demanded its production, was error. The Trial Court should not have peremptorily dismissed petitioner's respectful demand for the production of their respective notes without even inquiring whether the prosecutor could produce Agent Miller to substantiate the prosecution's disclaimer of these notes. The Court's imperious dismissal of petitioner's objection plainly forecast the futility of further protestation. Cf. *Young* v. *United States* (CADC 1965), 346 F. 2d 793, 796.

The error of the Trial Court by its previous ruling of "privilege" to Hedges, thereby sealing co-petitioner's lips is best summarized in the minutes of sentence (Tr. 1864-1874) inclusive, by Miss Kahn's trial counsel. A government witness-attorney, Nathan Kestnbaum, requested a ruling on the question of privilege in the case at bar and after Judge McLean ruled, he testified in conformity therewith (274a-275a).

Co-petitioner Kahn's problem is greater because the Trial Court applied ethical rules excessively rigid. Her request for a ruling is all to the good and demonstrates a healthy awareness by lawyers and judges of their duty to the legal profession in maintaining the trust and confidence which their clients place in them. As was so aptly stated in a comparative view written in Privileged Occasions and Professional Secrecy, Med. Sc. and Law, April 1966 issue, Vol. 6, p. 68 at 69:

"The judge has power to curb any improper line of cross-examination and should the doctor in the witness-box be asked for information damaging to his patient, he can show his reluctance to divulge it by asking the judge for his ruling. If he is told that the answer must be given, he is *liable in contempt* if he refuses to give it." (Emphasis added)

Co-petitioner Kahn did not invite error by requesting a ruling from the Trial Court (474a). Had counselor Kahn objected to the Court's ruling it would have been futile and could conceivably have subjected her to contempt charges (1338a). The Court's direction to seal her lips placed witness Kahn and her trial counsel in an unenviable dilemma: if they had objected within the jury's hearing it would have prejudiced the jury against the witness. In a conspiracy case, petitioner, too, has been injured although he wasn't at fault, for the jury would have given undue weight to the inference.

Petitioner has filed a petition for certiorari before this Court on May 23, 1966, which has been newly numbered 228 Misc. wherein the sordid practices employed by the Government is adequately set forth. If the order appealed from therein is not an interlocutory order, then petitioner urges this Court to consolidate the other petition and appendix with the instant case (please see The Attorney-Client Privilege Recent Invasions, La. Bar Journal, May 1966 issue). See, also, 41 St. Johns L. Rev. 82 (1966) for a Third-Party Consent to Search and Seizure article applicable herein.

In view of the prejudice resulting from the pre-arrest delay, petitioner and co-petitioner Kahn were deprived of their constitutional right to due process of law under the Fifth Amendment and to a speedy trial under the

Sixth Amendment. It cannot be denied that petitioner was suspect as far back as June, 1962 when Patricia Hedges testified petitioner met her and gave her $3,000 to post as collateral for Charles Hedges; he was cooperating then, according to prosecutor Tendy, and so was Patricia. The sole reason petitioners were arrested and indicted in November, 1965 was due to petitioner's demand therefor (Appendix H, *infra*). May petitioner refer this Court to three law reviews for support of petitioner's contention:

1) 51 Iowa L. Rev. 670 (1966);

2) 41 N.Y.U. L. Rev. 638 (1966);

3) 50 Minnesota L. Rev. 984 (1966).

Petitioner hereby adopts all reasons for granting the writ of certiorari heretofore presented by co-petitioner Kahn.

CONCLUSION

May it please the Court, it is respectfully urged that the petition for a writ of certiorari be granted and may this Court exercise its supervisory powers over the administration of federal criminal justice herein.

Dated: September 24, 1966.

Respectfully submitted,

ISRAEL SCHAWARTZBERG
Petitioner pro se

APPENDIX A

Opinion of United States Court of Appeals, Second Circuit, Affirming Judgment of Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1965.

(Argued June 3, 1966 Decided July 18, 1966.)

Docket No. 30430

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCES KAHN, VINCENT PACELLI and ISRAEL SCHAWARTZBERG,

Appellants.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction for endeavoring to obstruct justice and conspiracy to obstruct justice, 18 U. S. C. §§1503, 371, entered in the District Court for the Southern District of New York after trial before Edward C. McLean, *Judge,* and a jury. Affirmed.

Appendix A

JEROME LEWIS, Brooklyn, N. Y. (Frances Kahn, Bronx, N. Y., and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant Frances Kahn.*

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., with him on the brief), *for the appellant Pacelli.*

ISRAEL SCHAWARTZBERG, Bronx, N. Y., *pro se.*

JOHN S. MARTIN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and John E. Sprizzo, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

Frances Kahn, Vincent Pacelli, and Israel Schawartzberg appeal from judgments of conviction. All three were convicted of conspiracy to obstruct justice and suborn perjury, in violation of 18 U. S. C. §§371, 1503, and 1622. In addition, Pacelli was convicted of obstructing justice in violation of 18 U. S. C. §1503. Each appellant was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count.

1. *The Sufficiency of the Evidence.*

The Government maintained at trial, and the jury found, that the appellants worked together in an effort to prevent one Charles Hedges from testifying against appellant

Pacelli. On appeal, each of the appellants challenges the sufficiency of the evidence as to the counts on which he or she was convicted.

Viewing the evidence in the light most favorable to the Government, *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963), the following story emerges from the testimony at trial. Hedges was convicted for violation of the federal narcotics laws and was sentenced to fifteen years' imprisonment by the District Court of the District of Connecticut in March 1961. In July 1962, Hedges agreed to testify against certain of the people with whom he had been associated in the narcotics trade. His testimony before a grand jury in the Southern District of New York in June and September 1964 contributed to an indictment against Pacelli and others for conspiracy to violate the federal narcotics laws. Hedges testified at the trial on that indictment in May 1965.

Towards the end of July 1962, Pacelli visited Joan Hedges, Hedges' first wife; gave her $500; found out that Hedges needed $5,000 to get out on bail pending appeal; and learned that his lawyer was Frances Kahn. On July 30, 1962, Schawartzberg, Kahn's legal secretary, met with Hedges' fiancee and future wife, Patricia Curtin; gave her $3,000 of $5,000 he apparently had received; and instructed her to use the money to open a savings account to be used as collateral for Hedges' bail.

On January 9, 1963, Schawartzberg introduced Pacelli to Hedges' second wife Patricia, saying that Pacelli had put up the money for Hedges' bail. Pacelli told Patricia that he would give Hedges and her as much money as they needed to go away pending the appeal and even afterwards. Schawartzberg told Patricia that "he [apparently meaning

Pacelli] just doesn't want Charlie to do anything against him."

On January 14, 1963, Schawartzberg called Patricia, asked if Charlie was still Pacelli's friend, and said that Kahn was going to visit Charlie. Two days later, Kahn visited Hedges and asked what he intended to do. When he said, "Tell them to run because I'm through with them," she said: "I don't think that's like you. You wouldn't do anything like that." She made similar statements during her repeated later visits to Hedges whenever he indicated that he was thinking of "talking."

On September 22, 1963, Kahn told Hedges that if he didn't testify, Vince would lend him $25,000, which he wouldn't have to repay if he were indicted again, and that he would have complete protection.

In July and September 1964, Kahn told Hedges that if he were called before the grand jury he should push back the dates of his dealings in narcotics so that prosecution would be barred by the statute of limitations. In her July visit, she also told Hedges that if he did testify he should make sure that the Government guaranteed his wife's protection, since she was afraid for him and his wife; and she suggested that if he acted crazy he wouldn't have to testify. In an August 1964 visit, apparently referring to Hedges' intention to testify, Kahn said: "I hate to see you destroy yourself, and that's what you'll do."

The evidence just summarized was ample to take to the jury the question of appellants' guilt on the conspiracy count. We find no force in the contentions of Kahn and Schawartzberg that their acquittals on the substantive counts demonstrate the insufficiency of the evidence against them on the conspiracy count. The acquittals at most indicate inconsistency in the jury's verdict, which is not by

itself grounds for reversal, *Dunn* v. *United States*, 284 U. S. 390 (1932); see *United States* v. *Maybury*, 274 F. 2d 899 (2d Cir. 1960). The inconsistency here was not irrational, since the jury could have believed that Schawartzberg and Kahn, while working together with Pacelli, did so at his bidding and were correspondingly less culpable.

The evidence as to Pacelli's membership in the conspiracy was also sufficient to go to the jury. The jury properly could have found not only that Pacelli was working with Schawartzberg and with Schawartzberg's employer Kahn in an effort to keep Hedges quiet, but also that their joint efforts lasted up until the time Hedges began to testify before the grand jury. See *United States* v. *Perlstein*, 126 F. 2d 789 (3d Cir.), *cert. denied*, 316 U. S. 678 (1942).

Pacelli contends that the evidence against him on the substantive count was insufficient as a matter of law, since at the time involved in that count—January 9, 1963—there was no pending proceeding in which Hedges was to testify. See *Pettibone* v. *United States*, 148 U. S. 197, 207 (1893); *United States* v. *Scoratow*, 137 F. Supp. 620 (W. D. Pa. 1956). We need decide neither the correctness of *Scoratow* nor its application to a case in which the potential witness has actually agreed to testify. Pacelli's sentence on the substantive count was concurrent and of the same length as his sentence on the conspiracy count, and we conclude, for reasons set out elsewhere in this opinion, that his conviction on the conspiracy count should be affirmed. See *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Benjamin*, 328 F. 2d 854, 856 (2d Cir.), *cert. den.* sub nom. *Howard* v. *United States*, 377 U. S. 953 (1964).

We find no merit in Pacelli's contention that because he rested his case and moved for acquittal at the close of the

Government's case, the jury should have been instructed to consider as against him only the evidence adduced on the Government's case. The question of the sufficiency of the Government's case was a legal one; and once the trial court had decided that the Government's case was sufficient to go to the jury, we see no reason why the jury should not also have been free to consider the testimony of Pacelli's co-defendants.

2. *The Motions for Severance.*

Each of the appellants attack the denial by the trial court of his or her motion for a severance. Pacelli contends that the trial court should have severed the case as to him because he was prejudiced by the testimony of Kahn during the presentation of her defense, which tended to establish a link between Kahn and Pacelli which had been supplied only inferentially in the Government's case. This did not by itself require the trial court to sever Pacelli's case, see *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2d Cir.), *cert. denied* sub nom. *Legere* v. *United States,* 379 U. S. 828, 859 (1964), particularly since Kahn's testimony in no way indicated that she worked together with Pacelli in attempting to keep Hedges quiet. Pacelli also maintains that he was prejudiced by his codefendants' arguments that the whole case was an unfair attempt by the Government to destroy Kahn as a lawyer, since the jury may have thought it had to convict all three defendants in order to clear the Government of the charges made by Schawartzberg and Kahn. We believe that the danger of prejudice to Pacelli from his codefendants' position was far too remote to require severance. The jury could presumably keep separate the positions of the three defendants in this relatively short and

simple trial. Cf. *United States* v. *Bentvena,* 319 F. 2d 916, 930-31 (2d Cir.), *cert. denied* sub nom. *Ormento* v. *United States,* 375 U. S. 940 (1963).

Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to call witnesses. Their position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged, *Johnson* v. *United States,* 318 U. S. 189, 195 (1943); McCormick, Evidence §131 (1954), whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous, *Gorin* v. *United States,* 313 F. 2d 641, 645-46 (1st Cir.), *cert. denied,* 374 U. S. 829 (1963); *Olmstead* v. *United States,* 19 F. 2d 842, 847-48 (9th Cir. 1927), *aff'd,* 277 U. S. 438 (1928), at least in the absence of anything in this record indicating that the co-defendants would have given exculpatory evidence, see *United States* v. *Echeles,* 352 F. 2d 892 (7th Cir. 1965).

3. *The Charge on Conspiracy.*

The trial court's instructions as to the law of conspiracy, attacked by Pacelli as not adequately focusing the attention of the jury on the questions whether the evidence established one conspiracy or many and whether Pacelli was a knowing member, were entirely proper in the context of this case. The court not only instructed the jury that it had to find that the conspiracy existed as charged in the indictment, but also that the defendants knowingly associated themselves with the conspiracy and that each defend-

ant's association with the conspiracy had to be determined only from evidence as to that defendant's own acts, declarations, and conduct. See *United States* v. *Stromberg*, 268 F. 2d 256, 264-65 & n. 10 (2d Cir.), *cert. denied*, 361 U. S. 863, 868 (1959).

4. *The Conduct of the Prosecution.*

At several of the interviews between Kahn and Hedges while the latter was in prison, electronic equipment was placed with the consent of Hedges both on Hedges and around the room in an effort to record the conversations between the two. The resulting tapes were not particularly intelligible, since Kahn carried a portable radio with her on her visits and turned it up whenever she had anything important to say.

Appellants' pre-trial motions to suppress these tapes were denied. We do not need to consider the merits of those motions, since the tapes were not introduced or mentioned at trial. Kahn and Schawartzberg contend that the prosecutor hinted at the existence of the tapes in his summation, when, after Kahn's counsel had pointed to Kahn's candor in testifying about the offer of money to Hedges, the prosecutor said, "Do you have any way of knowing whether or not had she denied that the Government could have proved it otherwise?" This brief remark, improper though it was, did no more than suggest the possession of further proof by the Government, if indeed it did that much: Hedges had testified for the Government as to the offer. Even if the tapes were unconstitutionally obtained, this fleeting reference did not amount to the use at trial of unconstitutionally obtained evidence. Cf. *United States* v. *Guerra*, 334 F. 2d 138 (2d Cir.), *cert. denied*, 379 U. S. 936 (1964).

Nor should the trial court have dismissed the indictment because of the possibility that the tapes might have been played before the grand jury. Even if the tapes were illegally obtained, their admission before the grand jury would not justify the relief requested unless the defense was able to show that the indictment rested solely on incompetent evidence. See *Costello* v. *United States,* 350 U. S. 359 (1956); *Lawn* v. *United States,* 355 U. S. 339 (1958); *Cochran* v. *United States,* 310 F. 2d 585, 590 (8th Cir. 1962). Here, both Hedges and his wife Patricia testified before the grand jury, and their testimony was both competent and ample grounds for the indictment.

Kahn maintains that the conduct of Hedges amounted to entrapment. She requested no charge on entrapment at trial, and was entitled to none. There is no testimony in the record which suggests that Hedges ever asked for money for his wife or himself in return for not testifying.

Kahn and Schawartzberg contend that the use of Hedges, if not entrapment, was so offensive that this court should reverse the convictions resulting from this use in the exercise of its supervisory power over the machinery of federal justice and law enforcement. Appellants find it particularly heinous that Hedges never told Kahn that he was no longer her client, and seek to show that the Government somehow abused the attorney-client privilege. However, the attorney-client privilege is not involved. That privilege is the client's, not the attorney's; and in any case, it does not extend to advice from the attorney in furtherance of a crime. McCormick, Evidence §96, §99 (1954). Nor is the use of Hedges in some other fashion offensive. As we have seen, he did not solicit bribes from Kahn; she came to him with offers of bribes and with veiled threats that he better not testify.

Kahn also urges upon us as grounds for reversal the alleged misconduct of an Assistant United States Attorney for the Southern District of New York. According to Kahn, Hedges admitted to this Assistant United States Attorney that he had been involved in the narcotics activity for which he had been convicted in Connecticut. This admission was made while Hedges was appealing from his Connecticut conviction, partly on the grounds of the insufficiency of the evidence against him. We fail to see how Hedges' right to challenge the sufficiency of the evidence against him was affected by his post-trial admission of guilt; or what the receipt of the post-trial admission, which apparently did not exculpate any of the codefendants, obliged the Assistant United States Attorney to do. In any event, the matter is entirely irrelevant to the present appeal.

5. *Rulings During the Course of Trial.*

Appellants contend that a variety of the rulings of the trial court were erroneous. Kahn argues that the attorney-client privilege was improperly invoked to prevent her from describing the legitimate objectives of her many visits to Hedges in prison, and that this restriction made it seem that she visited Hedges only for illicit purposes: suborning perjury or trying to prevent him from testifying. However, as the Government makes clear in its brief, Kahn herself suggested that she should not go into the nature of the topics discussed with Hedges. She hardly can object to a ruling she invited and did not object to when made.

Kahn and Schawartzberg contend that Hedges should not have been allowed to invoke his privilege against self-incrimination when questioned about the details of crimes, the commission of which he already had admitted. We do

not think it was reversible error to prevent defense exploration of the details of the crimes on cross-examination. Hedges may well have waived his privilege against self-incrimination by admitting commission of the crimes, but Kahn and Schawartzberg had already gotten most of the benefit they were going to get out of the crimes by virtue of Hedges' admission. His admission at once undermined his own credibility and indicated a legitimate lawyer-client reason for the many visits by Kahn to Hedges in prison. Exploration of the details of the crimes would have been largely superfluous. See *United States* v. *Irwin,* 354 F. 2d 192, 198 (2d Cir. 1965); *United States* v. *Owens,* 263 F. 2d 720, 722 (2d Cir. 1959).

Appellants also contend that the court should not have permitted the jury to be present when the Jencks Act material was being marked for identification. Perhaps it would be better had the identification of the Jencks Act material been done in the absence of the jury, see *Johnson* v. *United States,* 347 F. 2d 803, 806 (D. C. Cir. 1965); but this taken by itself is not sufficient grounds for reversal. See *Roberson* v. *United States,* 282 F. 2d 648, 650-51 (6th Cir.), *cert. denied,* 364 U. S. 879 (1960).

6. *Conclusion.*

We have carefully considered each of the remaining assignments of error put forward by the appellants, and find them devoid of merit. The convictions are accordingly affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHWARTZBERG,
and VINCENT PACELLI,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of August, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRANCES KAHN, and ISRAEL SCHAWARTZBERG,
Defendants-Appellants.

Appendix C

A petition for a rehearing in banc having been filed herein by counsel for the appellants pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Ninth amendment of the Constitution of the United States provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

APPENDIX E

Statutes Involved

Title 18, U.S.C.A. §2 provides:

Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, U.S.C.A. §371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §401 provides:

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

Appendix E

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, U.S.C.A. §1503 provides:

Influencing or injuring officer, juror or witness generally

Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official

duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Title 18, U.S.C.A. §1622 provides:

Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 774.

Title 18, U.S.C.A. §3500 provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject

matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the

trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

§738, Code of Criminal Procedure, New York State provides:

Eavesdropping

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes,

employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping.

§739, Code of Criminal Procedure, New York State provides:

Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs.

Appendix E

§740, Code of Criminal Procedure, New York State provides:

Punishment for eavesdropping

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years.

§813-a, Code of Criminal Procedure, New York State provides:

Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time

specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

APPENDIX F

Respective Orders of District Court Judges re Eavesdropping Tapes Reclarification

Re: United States v. Israel Schawartzberg
Ind. No. 65 Cr. 999

Nunc pro tunc as of January 6, 1966, 2:45 P.M., the parties were directed that the reclarification of the tapes will commence on January 11, 1966, at 10:30 A.M., at Manhattan Sound Corp., 420 West 56th Street, New York City, and continue thereafter without interruption until completed, from 10:30 A.M. to 4:30 P.M. each day.

During the reclarification, petitioner Israel Schawartzberg may have an expert present but the reclarification process shall proceed as above directed regardless of the presence of said expert.

Petitioner personally may not attend at the reclarification process. Agent Thomas J. Dugan of the Federal Bureau of Narcotics may not attend at the reclarification process.

The foregoing directions, made as aforesaid, are deemed dispositive of this motion, and it is so ordered. No further order is necessary.

/s/ Sidney Sugarman
U.S.D.J.

Dated: New York, New York
January 10, 1966

[File endorsement omitted.]

The within motion to impound the tapes is denied, except that the defendant is permitted to have an expert present during the reclarification process.

So ordered.

(12/27/65)

/s/ Charles H. Tenney

APPENDIX G

Order Denying Application to Cite Government For Contempt

February 3, 1966

The moving papers and the affidavit of Erwin Damsky, sworn to January 25, 1966, fail to disclose any disobedience by Howard L. Jacobs, William M. Tendy, Thomas J. Dugan or Norris Durham, of any order of Judge Tenney or Judge Sugarman, or of any misrepresentation by Howard L. Jacobs to Judge Sugarman.

Accordingly, the motion by defendant Schawartzberg "for an order citing" the said Jacobs, Tendy, Dugan and Durham "for Contempt of Court and for Obstructing Justice" is in all respects denied.

The said affidavit of Damsky will be forthwith referred to Judge McLean in connection with a motion by the government for further reclarification of the tapes, now pending before him.

It is so ordered. No further order is necessary.

/s/. SIDNEY SUGARMAN
U.S.D.J.

APPENDIX H

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of the Application for an Order Dismissing the Indictment for Want of Prosecution, or to Forthwith Arrest Movant ISRAEL SCHAWARTZBERG,

—against—

UNITED STATES OF AMERICA,

Respondent.

SIRS:

ISRAEL SCHAWARTZBERG, movant herein, duly sworn to the 1st day of November, 1965, and upon the Exhibits attached hereto in support thereof, the undersigned will move this Court at the United States Courthouse, Room 318, thereof, on the 8th day of November, 1965, at 10:30 A.M., for an Order directing the Government to dismiss the indictment heretofore found against movant, for want of prosecution and/or for unnecessary delay in arresting him and bringing him to trial, pursuant to Rules 47, 48 and 48(b) of the Federal Rules of Criminal Procedure, and the undersigned further moves for such other, further and different relief as may be just and proper in the interest of substantial justice.

Appendix H

Dated: November 1st, 1965
Bronx, New York City

Yours, etc.,

ISRAEL SCHAWARTZBERG
Movant Pro Se
Post Office Address
157 Field Place
Bronx, New York City, 10468

To:

HON. ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York
Respondent
United States Courthouse
Foley Square, New York, 10007

Clerk of above Court

APPENDIX I

Notice of Motion for Speedy Trial, etc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Misc. No. 18-65

UNITED STATES OF AMERICA,

Plaintiffs,

—against—

ISRAEL SCHWARTZBERG,

Defendant.

HONORABLE SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ISRAEL SCHAWARTZBERG, defendant herein, and upon the Complaint currently pending against said defendant in the above captioned matter, the said defendant will move this Court for an Order directing the attorneys for the Government to either dismiss the Complaint for lack of prosecution or to move this cause for a speedy indictment in order to afford defendant a speedy trial, pursuant to the Rules of the Federal Rules of Criminal Procedure; and the defendant will move for such; other, further and different relief as may be just and proper, on the 14 day of October, 1963, in Room 318, United States Courthouse, Foley Square, New York, on the opening of Court on said day or as soon thereafter as can be heard.

Appendix I

Dated: October 1st, 1963.
New York City, N. Y.

Yours, etc.,

ISRAEL SCHWARTZBERG
Defendant pro se
157 Field Place
Bronx 68, N. Y.

To:

HON. ROBERT M. MORGENTHAU
United States Attorney
Southern District of New York
Foley Square 7, New York

CLERK OF ABOVE COURT

APPENDIX J

Affidavit of Defense Electronic Expert Erwin Damsky in Support of Motion to Cite Prosecutors & Agents

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[SAME TITLES]

SUPPORTING AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.:*

ERWIN DAMSKY, being duly sworn, deposes and says:

That I am the sound expert who was employed by the above named defendant to attend the reclarification process in compliance with the respective orders made by Judge SIDNEY SUGARMAN on January 6th and 10, 1966, by Judge CHARLES H. TENNEY on December 27th and 29th, 1965.

I did attend the reclarification process on January 11th, 1966, at which time Federal Bureau of Narcotics Agent NORRIS DURHAM was also present at the processing were three employees of Manhattan Sound Corp.

The processing commenced at about 10:20 and was concluded at about 6 P.M. on January 11th, 1966. The agreed procedure was for me to make copies of the Government's eavesdropping tapes between counselor FRANCES KAHN and her client CHARLES HEPGES. Then the Government was to make copies of said tapes simultaneously with the improvement of the clarity of sound. Then I was to make a copy of the reclarified tapes after the Government concluded their experiment. All this was done. Federal Agent

Appendix J

The Sealing Process

Norris Durham and I both agreed to simply *mark for identification* all boxes containing the three sets of tapes so as not to mix up the defense and Government tapes. While signatures and string appear on the respective boxes of tapes belonging to the Government and to the defense, these boxes of tapes were *not sealed.* Government Agent Durham and I placed all the boxes of tapes, consisting of three (3) bundles, in *one master carton* with string tied to it and this string was covered with three-inch sealing gummed tape across which was written the initials of both the Agent and myself. The Federal Agent and I agreed that this method of sealing the master carton was the sole and safest way to insure the non-tampering of the tapes while I am not present.

I have just been informed by the defendant, Israel Schawartzberg, that prosecutor Howard L. Jacobs broke the seal on the master carton and listened to the Government's tapes. This action, in my absence, is contrary to Federal Agent Durham's and my express agreement and the tapes are, in my opinion, now so tainted as to make it impossible for me to attend any other reclarification process because it is now possible that the tapes were altered, edited and tampered with in my absence and without giving notice to my employer, Israel Schawartzberg, and I. I will be glad to appear at a hearing if this honorable Court so desires.

Sworn to the 25th day of January, 1966.

/s/ Erwin Damsky

(Duly verified.)

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 557

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 593

FRANCES KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 594

ISRAEL SCHAWARTZBERG

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1966. Petitions for rehearing on behalf of Kahn and Schawartzberg were denied on August 26, 1966. On August 12, 1966, Mr. Justice Harlan extended the time for filing Pacelli's petition for a writ of certiorari to September 16, 1966. Pacelli's petition was filed on September 15, 1966. The petitions of Kahn and Schawartzberg were filed on September 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that conversations between petitioner Kahn and government witness Hedges were recorded with the consent of Hedges warrants reversal of petitioners' convictions even though the recordings were not introduced at petitioners' trial.

2. Whether the court properly prevented defense counsel from inquiring into the details of criminal offenses committed by a prosecution witness.

3. Whether the jury's awareness of the fact that a large amount of material was turned over to defense counsel after a government witness' direct testimony prejudiced petitioners.

4. Whether the convictions of petitioners Kahn and Schawartzberg on a conspiracy count are affected by their acquittals on substantive charges.

5. Whether the prosecutor's closing remarks were improper.

6. Whether the court abused its discretion in refusing to grant motions for severance.

7. Whether the court properly denied the request of petitioner Pacelli, who had rested at the conclusion of the government's case, for instructions that evidence subsequently furnished by the codefendants should not be considered against him.

8. Whether various procedural errors were committed at petitioners' trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York petitioners were convicted of conspiring to obstruct justice and to suborn perjury in violation of 18 U.S.C. 371, 1503, and 1622. Petitioner Pacelli was also convicted on a substantive count of obstructing justice, in violation of 18 U.S.C. 1503. On March 30, 1966, each petitioner was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count. The court of appeals affirmed all the convictions.

The evidence showed that in March 1961, Charles Hedges was convicted in the United States District Court for the District of Connecticut of violating the narcotics laws and was sentenced to imprisonment for fifteen years and fined $10,000 (A. 57a, 188a, 442a).[2] Hedges had been represented by petitioner Kahn at his trial. He was unable to post $50,000 bail pending appeal, and was sent to the federal penitentiary in Lewisburg, Pennsylvania (A. 445a). In late June

[2] The record of trial, filed with the Clerk of this Court, includes the two-volume Appellants' Joint Appendix filed in the court of appeals ("A."), all papers filed in the district court, and the transcript of trial ("Tr.").

1962, Hedges was transferred to a detention center in New York City, where efforts were made to obtain his cooperation with the government (A. 59a). In early July, Hedges agreed to assist federal authorities in their investigation of the narcotics ring of which he had been a member (A. 60a, 167a–169a). Among those implicated by Hedges was petitioner Pacelli (A. 68a, 169a).

In July 1962, Hedges was transferred to Westchester County Jail, Valhalla, New York. On July 16 petitioner Kahn made the first of more than thirty visits to Hedges. At his request, Miss Kahn filed a motion with the district court to reduce his bail pending appeal to $25,000 (A. 61a–62a). On July 20, 1962, Pacelli visited Hedges' former wife and gave her $500 to use for herself and her five children. Pacelli learned from Mrs. Hedges that Miss Kahn was the attorney for Hedges (A. 311a). Mrs. Hedges also relayed Hedges' message that Pacelli ought to "leave town" (A. 310a). Pacelli professed ignorance of the reason for Hedges' admonition (A. 310–311a).

On July 30, 1962, petitioner Schawartzberg, Miss Kahn's clerk met with Hedges' fiancee, Patricia Curtin, and gave her $3,000, which he said had been received from Pacelli for use as collateral for Hedges' bail (A. 314a–316a). On August 1, 1962, Miss Curtin was able to secure the remaining collateral required to obtain Hedges' release (A. 356a–357a). Later that month Hedges went to Miss Kahn's office, where Schawartzberg handed him a prepared affidavit which declared that Pacelli and two others were not involved

in the narcotics ring. At Schawartzberg's urging, Hedges signed the affidavit (A. 80a–81a).[2]

In mid-December 1962, Hedges was seriously injured, and was treated in the prison ward of a Kings County hospital. Schawartzberg made several attempts to communicate with Patricia (Curtin) Hedges,[3] and tried unsuccessfully to retrieve the $3,000 he had given her (A. 317a). On January 9, 1963, Schawartzberg called Mrs. Hedges and arranged to meet her later that day in the lobby of the office building in which she worked. She alerted the Bureau of Narcotics, which arranged to have two agents maintain a surveillance of the meeting (A. 319a).

Petitioner Pacelli accompanied Schawartzberg to the meeting, and was introduced to Patricia Hedges by Schawartzberg (A. 320a). Pacelli maintained that he was Hedges' friend, and wanted to help Hedges. He stated that he had in the past advised Hedges to "take off," but Hedges "didn't have enough sense to listen to him." Pacelli then offered to give Mr. and Mrs. Hedges as much money as they needed to "go away * * * pending the appeal, and we could even stay away after the appeal" (A. 288a, 291a, 320a). Pacelli requested that Patricia obtain an answer from Hedges within a few days.

On January 14, 1963, Schawartzberg telephoned Patricia to determine if she had relayed Pacelli's offer to Hedges and advised her that Miss Kahn would soon visit Hedges (A. 323a). Two days later

[2] In November 1962, Schawartzberg destroyed the affidavit in Hedges' presence (A. 81a–82a).

[3] Hedges married Patricia Curtin in September 1962.

Miss Kahn saw Hedges in the hospital and asked him what he intended to do. Hedges replied, "Tell them to run. * * * I'm finished with all of them." Miss Kahn remarked, "I don't think that's like you. You wouldn't do anything like that" (A. 73a). Thereafter, Hedges was returned to Westchester County Jail to serve the remainder of his sentence. During Miss Kahn's frequent visits to him, she invariably discussed Hedges' intentions to cooperate with the government and would comment, "This is not like you to do anything like this. You're too much of a man" (A. 82a–83a).

Hedges' conviction was affirmed on March 31, 1963. However, a subsequent motion to reduce the sentence, filed by Miss Kahn, was granted on May 15, 1963, resulting in the elimination of the fine and a reduction to five years' imprisonment (A. 232a). No further relief was sought, and Hedges served the remainder of his term in the Westchester prison, until his release on May 19, 1965 (A. 77a–78a). Miss Kahn continued to visit him and to discuss his decision to assist the government. In September 1963, she told Hedges that Pacelli would lend him $25,000 if he agreed not to testify, and that he would have complete protection (A. 90a). In October 1963, Miss Kahn indicated to Hedges that she had attended a meeting with Pacelli and others and that she heard them agree to guarantee Hedges' safety and the $25,000 (A. 94a–97a).

In November, 1963, Hedges was taken to the court house to identify an individual involved in the nar-

cotics ring. The next day Miss Kahn visited Hedges and asked him whether he had been able to make the identification. She was delighted when Hedges stated that he did not identify the individual (A. 113a–114a).

In June 1964, Hedges testified before the grand jury. He did not tell Miss Kahn that he had done so. In July she suggested that if he was called before the grand jury, he should push back the dates of his dealings in narcotics so that the prosecution of others would be barred by the statute of limitations. She continued to urge Hedges not to testify, and suggested that, if he feigned insanity, the government would not summon him before the grand jury (A. 102a–106a, 127a–129a). Hedges testified before the grand jury in September 1964, again without disclosing that fact to Kahn. Shortly before and after this second appearance, Miss Kahn continually emphasized the importance of limiting his testimony to dates beyond the statute of limitations. She also expressed regret that Hedges was about to "destroy" himself and would be "picked apart" as a witness in a crowded courtroom (A. 139a–141a). On September 30, 1964, Pacelli and others were indicted for violations of the narcotics law. Hedges testified for the prosecution at Pacelli's trial in May 1965 (A. 142a; 363 F. 2d 385 (C.A. 2)).

ARGUMENT

1. At three of the interviews between petitioner Kahn and Hedges in the Westchester County Jail electronic equipment was used, with the consent of

Hedges, to record the conversations. Miss Kahn, who was aware that in the past the prison authorities had eavesdropped upon conversations between prisoners and visitors, habitually carried a transistor radio, which she turned on at a high volume whenever she conversed with a prisoner (A. 100a, 115a–116a, 475a–476a). The resulting tapes were hardly intelligible because of the noise of the radio. Although petitioners' pre-trial motions to suppress these tapes were denied (Motion to Supress, A. 20a–63a, 251 F. Supp. 702), the prosecution elected not to introduce the recordings at trial, and the jury was not told of their existence.[4] Petitioners nonetheless attack the electronic recordings in this Court (Kahn Pet. 11–17, 25, 27–28, 35–47; Pacelli Pet. 16; Schawartzberg Pet. 13–16). Petitioners' major challenge is directed at the alleged violation of the sancity of discussions between attorney Kahn and her client, witness Hedges. Whether or not Miss Kahn continued to serve as Hedges' attorney after his sentence was reduced,[5] the attorney-client privilege is a protection for the client,

[4] Because these tapes were never used in evidence, this case differs materially from *United States* v. *Osborn*, 350 F. 2d 497 (C.A. 6), certiorari granted, 382 U.S. 1023. Accordingly, a decision in the instant case need not await the decision in *Osborn*. In addition, there is no occasion to reconsider this Court's decisions in *Olmstead* v. *United States*, 277 U.S. 438, 455; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States*, 373 U.S. 427; and *Lanza* v. *New York*, 370 U.S. 139.

[5] Hedges said that he did not consider Miss Kahn to be his attorney after his sentence was reduced. However, he did not communicate his feelings to her nor did he formally discharge her.

and may be waived by him. Hedges voluntarily communicated the contents of the conversations to the government and chose to permit them to be recorded.

Petitioners further allege that the indictment should have been dismissed because the tapes might have been played before the grand jury. Even assuming, *arguendo,* that the recordings were incompetent evidence, petitioners, who had access to the transcripts of the grand jury testimony of Charles and Patricia Hedges, have not shown that there was no relevant or competent evidence upon which to sustain the indictment. See *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339; *Cochran* v. *United States,* 310 F. 2d 585, 590 (C.A. 8).

2. During the cross-examination of Hedges, testimony was elicited that, at the time of his arrest, he had on his person $1,500 which he had stolen (A. 218a). When asked for further details of the crime, Hedges invoked his privilege against self-incrimination. The court sustained Hedges' position despite counsel's assertion that further inquiry into the facts surrounding the collaterial crime would affect the credibility of the witness (A. 219a–221a). Petitioner Schawartzberg, who represented himself, renewed this line of questioning during his cross-examination, but the court barred him from inquiring into the details of prior crimes committed by Hedges (A. 270a–272a). Petitioner Kahn, citing no cases in support of her position, alleges that the trial court abused its discretion in sustaining the claim of privilege (Kahn Pet. 24–25). To the contrary, the offenses committed by

the witness were purely collateral. The only legitimate matter bearing on his credibility under established rules of evidence was whether he had been convicted of these offenses, and any exploration of the details of the crimes would have involved a tangential inquiry in an already lengthy trial. *United States* v. *Irwin*, 354 F. 2d 192, 198 (C.A. 2), certiorari denied, 383 U.S. 967; *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Owens*, 263 F. 2d 720 (C.A. 2).

3. Following the direct examination of Hedges, defense counsel moved under 18 U.S.C. 3500 for the production of all writings dealing with that witness' testimony. As the prosecution began to identify the notes he was handing over, defense counsel asked the court whether "this should be done out of the presence of the jury?" The trial judge replied that he did not think it necessary to remove the jury (A. 148a). The identification continued, following which the court called a recess so that defense counsel could read the material (A. 149a–155a). Counsel at trial made no further comment on the procedure. Petitioners now assert that defense counsel's suggestion was a "timely objection" and contend that it was error for the court to allow the jury to be present when the material was identified.

This belated contention lacks merit. *Roberson* v. *United States*, 282 F. 2d 648 (C.A. 6), certiorari denied, 364 U.S. 879. The court did not abuse its discretion in allowing the jury to observe the identification of the material. The trial judge noted that the

jury was apprised of the purpose of the identification (A. 148a). Later the court advised the jury that the notes turned over to the defense were not evidence (A. 679a–680a). These instructions, coupled with an admonition that the jury was to consider only the facts developed at the trial, in view of the lack of request by experienced defense counsel for further instructions regarding the incident, were sufficient to protect petitioners. The cases relied upon by petitioner (*Johnson* v. *United States*, 347 F. 2d 803 (C.A.D.C.); *Reichert* v. *United States*, 359 F. 2d 278 (C.A.D.C.)) held that it was error for the prosecutor to argue in his summation that, in light of the failure of defense counsel to impeach the witness, the material given to him must have corroborated the testimony of the witness. No such comment was made in the instant case.

4. The indictment contained seven counts (A. 11a–17a). All petitioners were convicted on the conspiracy count. Of the six substantive counts, two were dismissed by the trial judge (A. 425a). Petitioner Kahn, named in two others, was acquitted on both. Petitioner Schawartzberg was named in two counts, one of them jointly with Pacelli. Schawartzberg was acquitted; Pacelli convicted. Petitioners Kahn and Schawartzberg now argue that they must be acquitted on the conspiracy count because of their acquittal of the substantive offenses. Inconsistency in a jury verdict does not, however, vitiate any portion of that verdict. *Dunn* v. *United States*, 284

U.S. 390; *Koolish* v. *United States,* 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *Capello,* 327 F. 2d 378 (C.A. 2); *United States* v. *American Stevedores, Inc.,* 310 F. 2d 47 (C.A. 2), certiorari denied, 371 U.S. 969; *Cacy* v. *United States,* 298 F. 2d 227 (C.A. 9).

5. Petitioners' challenges to the prosecutor's summation are without substance. Those comments were not challenged at trial by petitioner Kahn's experienced counsel. See *United States* v. *Medlin,* 353 F. 2d 789 (C.A. 6), certiorari denied, 384 U.S. 973. The isolated remark now attacked by Kahn (Kahn Pet. 25) was ordered stricken by the judge. The prosecutor commented "With regard to this question of whether or not Hedges ever mentioned the $25,000 bribe to her, do your have any way of knowing whether or not had she denied that the Government could have proved it otherwise." The judge ordered the remark stricken, declaring, "I don't understand that last remark, but I will strike it out" (A. 575a). Petitioners also challenge the closing remark of the trial counsel that, as an advocate, he believed that the evidence justified convictions. This qualified expression of belief, which did not suggest that it was supported by proof other than the evidence adduced in open court, presents no ground for reversal. *United States* v. *Medlin, supra,* 353 F. 2d at 796; *United States* v. *D'Antonio,* 362 F. 2d 151 (C.A. 7), certiorari denied, No. 394, October 17, 1966. Nor was it improper for government counsel to object to petitioner Schawartzberg's attempt, during the sum-

mation which he delivered as counsel *pro se,* to get before the jury his version of the facts. Having chosen not to take the stand and be subjected to cross-examination, it was obviously improper for Schawartzberg to attempt to testify in his role as attorney for himself.

6. Petitioners Kahn and Schawartzberg allege that the court abused its discretion in denying their motions for a severance. They claim that in a separate trial Schawartzberg could have given exculpatory evidence for Miss Kahn while maintaining his right not to answer questions about the crime charged, whereas in a joint trial he would waive his privilege against self-incrimination if he testified at all. Obviously the failure to sever on this ground did not prejudice Schawartzberg. Nor has petitioner Kahn ever specified what kind of testimony was to be elicited from Schawartzberg, and whether it was actually exculpatory rather than collateral. Under these circumstances there was no abuse of discretion in rejecting the motions for severance on the purely hypothetical ground now being urged, *Gorin* v. *United States,* 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829. The decision in *United States* v. *Echeles,* 352 F. 2d 892 (C.A. 7), cited by petitioners, is inapposite. In that case the refusal to sever was held to be an abuse of discretion because the co-defendant had on three different occasions, in open court, given testimony supporting Echeles' innocence.

7. Pacelli's claim that, after he rested, the court should have instructed the jury not to consider sub-

sequent defense testimony against him is without merit. The government's evidence both directly and circumstantially connected Pacelli with the conspiracy, and petitioner has pointed to no particular defense testimony which, in any way, "strengthened the Government's case against Pacelli" (Pet. 12). Of the three defendants, only petitioner Kahn elected to testify, and her defense was a denial that she had ever urged Hedges to commit an illegal act (A. 480a). Her testimony did not introduce new evidence of Pacelli's guilt. The trial judge safeguarded Pacelli by his instructions to consider the evidence separately as to each defendant and render a separate verdict as to each on the conspiracy as well as the substantive counts (A. 601a, 624a). See *United States* v. *Houlihan,* 332 F. 2d 8, 15 (C.A. 2), certiorari denied, 379 U.S. 828. The mere fact that Pacelli's counsel did not agree with the line of defense taken by a co-defendant did not entitle him either to a severance or to a special instruction. And petitioner's claim of prejudice, reduced to its essentials, is simply that his co-defendants assumed an unwise posture before the jury.

8. There is no substance whatever to the various remaining contentions made by petitioners Kahn and Schawartzberg. The claim that a speedy trial was denied ignores the fact that only three months elapsed between arrest and trial. During that short period of time Schawartzberg and Miss Kahn submitted almost two dozen motions for pretrial relief on which several hearings were conducted and a number of written opinions and orders were filed (A. 1a–7a).

Nor was there unconscionable or intentional pre-arrest delay. There is no requirement that the government arrest an individual as soon as it has probable cause to believe he committed a criminal offense, and there is no basis here for any claim that petitioners were prejudiced by the alleged pre-arrest delay.

There is no merit to Schawartzberg's claim that the narcotics officer to whom Patricia Hedges gave the memoranda of her conversations with Schawartzberg should have been produced. This agent never observed any meetings between the parties. The court determined that all such memoranda were in the government's possession and had been given to defense counsel after Mrs. Hedges' direct testimony (A. 321a, 323a, 378a–379a, 382a, Tr. 1004, 1056, 1126–1127). Since all material was turned over, there was no need to conduct a *voir dire* examination on this issue. Cases cited by Schawartzberg dealing with statements not turned over to the defense are inapposite.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 593

FRANCES KAHN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF TO OPPOSING BRIEF FOR THE UNITED STATES ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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We would not ordinarily encumber this Court with a reply brief, however we note an extraordinary admission in the Government's opposing brief that had not come to any Court's attention before. We wish to spotlight this issue to the Court for it now raises a whole complex of issues concerning the administration of criminal justice in the federal Courts and the constitutional rights of all defendants. The Government admits for the first time that the eavesdropping tapes between petitioner and her client at the Westchester County Jail were used before the Grand Jury in this case (G. Brief, p. 9). Petitioner has steadfastly proclaimed that the eavesdropping tapes were unconstitutionally and illegally obtained and presented to the Grand Jury in order to indict petitioner (Petition for Certiorari pp. 14 and 28). The Government has conceded

that eavesdropping tapes were played for the benefit of the Grand Jury and with commendable candor, when the Government does not deny the tapes were used to obtain the indictment but instead thereof states (p. 9 *id.*):

> "Even assuming, *arguendo,* that *the recordings were incompetent evidence,* petitioners, who had access to the transcripts of the grand jury testimony of Charles and Patricia Hedges, have not shown that there was no relevant or competent evidence upon which to sustain the indictment. (Emphasis supplied.)

The Government could have flatly denied the tapes were used before the Grand Jury however, the Government takes the position that although the tapes were used they are nevertheless admissible before the Grand Jury because there was other evidence before the body of Grand Jurors which was competent, such as Charles & Patricia Hedges. The Government cites the *Costello* case, 350 U. S. 359; the *Lawn* case, 355 U. S. 339 and *Cochran* v. *United States,* 310 F. 2d 585, 590 (C. A. 8) as cases in point (G. p. 9). The *Costello* case was not meant nor intended to import any illegal and unconstitutional material to reach an indictment. The *Costello* case does not stand for the immunization of illegal and/or unconstitutional evidence just so long as other competent evidence is presented to the Grand Jury. The Government has again taken this Court's decision such as in *Costello, supra,* and is trying to create a total blackout to the Court by saying in effect that Courts are no longer permitted to look into any evidence imported into the Grand Jury room by the prosecution. No federal prosecutor worth his salt would take wiretap or eavesdrop evidence into a Grand Jury body and breathe life into such unconstitutionally or illegally obtained evidence by simply placing any witness before that body except if this Court would deny certiorari herein.

The dangers thereby would be terrible and would certainly wreak havoc to the protections afforded to defendants pursuant to Title 47, §605 of the Federal Communications Act; and the constitutional guarantees mandated by the Fourth, Fifth and Ninth Amendments to the United States Constitution. The Grand Jury convened on at least two occasions to hear Charles Hedges and his wife Patricia. Who can safely state that the Grand Jurors believed that pair without later listening to selected portions of the eavesdrop tape recordings. Who can state with certainty that the Grand Jurors would have found an indictment against petitioner unless the prosecution and/or Federal Bureau of Narcotics Agent Thomas J. Dugan were compelled to utilize some of the eavesdropping tapes existing between petitioner and Charles Hedges. Surely there was no supervision of how much of the eavesdropping tapes were played before the Grand Jury prior to the vote of the indictment and subsequent to the testimony of the Hedges pair.

Here we have an overriding policy of eavesdropping. Conspiracy charges without corroboration could have indicted petitioner except for the assumption that the Grand Jury elected to reject the Hedges' testimony against petitioner, a lawyer. This rejection compelled the prosecution to resort to the playing of the eavesdropping tapes before the Grand Jury. The prosecution did everything in its power to avoid admitting that there were certain portions or any portions of tapes which were presented to the Grand Jury in order to have an indictment returned against petitioner. We respectfully submit that the importation of these tapes for the benefit of the Grand Jury simultaneously concealing it from the Courts below and from petitioner must be stopped at its roots by dismissing the indictment so obtained. There are other considerations such as ruining a lawyer forever despite the fact she is entirely

innocent of any part of the alleged conspiracy; the finding of an indictment of conspiracy may well be used as a lever to obtain a plea from a co-defendant and guarantee him freedom in return for his testimony against petitioner. The record reflects that co-petitioner Schawartzberg stated he was propositioned by the prosecution to incriminate petitioner, and co-petitioner Pacelli was visited by federal agents at the direction of the prosecution during his stay at West Street Federal Prison in New York City upon his return from Atlanta to New York City to plead not guilty to the instant indictment.

The reckless disregard of petitioner's constitutional rights on the part of the prosecution to bring the eavesdrop tapes to be played before the Grand Jury compelled the Grand Jurors to believe the Hedges' concocted story despite the Grand Jurors' previous disbelief in the Hedges' tale of conspiracy and the substantive charges. Lawyers throughout the country will be at the mercy of the prosecutors and purported clients if the decision of the Court below is permitted to stand. We respectfully implore this Court to exercise its supervisory powers and to stop this great danger at the root. The acts of the prosecution before the Grand Jury is not a full curtain to look at and render this Court helpless to eradicate this evil.

The case at bar is readily distinguishable from the *Costello* case, *supra*. Eavesdropping tapes in part or in full do not rise to the level of hearsay evidence. In *Costello,* it was a "net worth" case with a sole defendant with hearsay testimony of three federal agents. The Grand Jury in the *Costello* case listened to three federal agents and accepted their testimony as competent although it was hearsay. In the instant case the Grand Jurors heard from Mr. & Mrs. Hedges who had their own reasons to incriminate petitioner in return for the ten year reduc-

tion of sentence which reduction the Government took credit after petitioner had obtained such reduction pursuant to suggestion by the sentencing Court in Connecticut (Timbers, *J.*). Notwithstanding the evidence of the Hedges to the Grand Jury in this case the prosecution brought the eavesdrop tapes before that body in its efforts to indict petitioner and to rehabilitate the rejected testimony of the Hedges.

The *Lawn* case cited by the Government, 355 U. S. 339 (1957) is also inapposite to the instant case. In the case at bar we have a situation where the eavesdropping tapes were utilized in the presence of the Grand Jury in order to obtain an indictment which otherwise would have been unobtainable and the prosecution then suppressed that fact from the pre-trial and trial Judges and the defendants. The prosecutor in his affidavit in opposition to petitioner's inquiry concerning the use of the tapes before the Grand Jury swore that petitioner's contention *"is totally without* merit" (Emphasis added).

In *Cochran* v. *United States,* 310 F. 2d 585 (8 Cir. 1962), that case is inapposite to the case at bar in that the Trial Judge failed and refused to inspect the Grand Jury minutes to determine whether eavesdrop tapes were played for their ears while in *Cochran, supra,* the District Judge examined the Grand Jury file and found the indictment proper on its face.

Obviously the statement by the Government at page 9 of their brief permits of only one construction: that the Government did use the eavesdropping tapes or selected parts therefrom in the Grand Jury room and obtained this indictment. Petitioner challenged the indictment on such grounds prior to trial but the motion to inspect was denied without the Court so much as reviewing the evidence presented to the Grand Jury. First this Court had the case

of *Black* v. *United States* (decided today), come all the way to this Court and after denial of the petition for the writ of certiorari it was learned by *Black* that his hotel room conversations between him and his attorney had been bugged. The Solicitor General filed a memorandum in May of 1966 admitting that (P. "2" of said Memorandum):

> "However, the listening device was in operation from approximately two months before until approximately one month after the evidence was presented to the grand jury and the indictment was returned."

The Solicitor General continued (at p. "4" thereof):

> "The Department of Justice's investigation of this incident indicates that none of the evidence presented to the grand jury or used at petitioner's trial was obtained, either directly or indirectly, from any improper source."

The memorandum of the Solicitor General concluded that this Court should consider *Black's* petition for rehearing and if denied it should be denied "without prejudice to a further hearing on appropriate motion in the district court." Alternatively, the Solicitor General suggested (p. "5" *id.*):

> "This Court could issue a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the district court for further proceedings . . ."

In the *Black* case, *supra,* he charged that his trial was tainted by F.B.I. wire tapping and by the placing of an "eavesdropping device" in his hotel suite. We need merely consider the following excerpts of the pre-trial motions of petitioner and co-petitioner Schawartzberg and the affidavit of the then prosecutor, Howard L. Jacobs, Esq., and it will

reveal the prosecution in the district Court wilfully and deliberately concealed from petitioners and the district Court that eavesdropping tapes of client Charles Hedges, chief Government witness, and petitioner, the said client's attorney, were used before the Grand Jury to secure the indictment. Of course, petitioner's case is on as good ground as *Black*. Now we have this case come as far as it did before this tribunal, when we now learn that eavesdrop evidence was used in the Grand Jury room to obtain the indictment, to wit:

a) Petitioner's pre-trial Notice of Motion to dismiss the instant indictment (11-20),* *inter alia,* at paragraph "12" on page "4" thereof sought an order "directing a dismissal of this indictment on the ground that the Federal Grand Jury which heard the evidence presented herein, were not afforded the opportunity to listen to each and every single tape recording taken in Westchester County Jail, all of which is a suppression of material evidence on the part of the prosecution which would have been favorable to the accused and which would have prevented the finding and return of this indictment."

b) The prosecutor's answer thereto is set forth in his opposing affidavit (69-76)* at paragraph "22" thereof which avers: "Kahn Item 12 seeks a dismissal of the indictment on the grounds that the grand jury did not hear all of the tapes. This is totally without merit."

c) Petitioner's pre-trial Notice of Motion, *supra,* paragraph "18," Item "o" also requested a bill of particulars whether any eavesdropping orders were obtained against petitioner "* * *" and whether it was presented to the Grand Jury." The prosecution refused to disclose it as appears from their affidavit at paragraph "32."

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*Refers to pages of Index to Record on Appeal in Court of Appeals.

d) In co-petitioner Schawartzberg's pre-trial Notice of Motion requesting a bill of particulars (21-44)* he wrote at page "9," Item "xvii" thereof: "State whether the Grand Jury listened to each and every electronic recording now in possession of the prosecution as pertaining to Charles Hedges and Frances Kahn." The Government refused to furnish the desired bill of particulars and simply evaded the issue.

From all of the foregoing, the prosecution succeeded in hoodwinking the pre-trial motion Court and the trial Court and the defendants in this case. Now that the Solicitor General refuses to be a party to this deception which was practiced by the prosecution in the District Court and on appeal to the Court of Appeals for the Second Circuit this Court's supervisory powers over the administration of federal criminal justice should be exercised herein.

The Government seeks to justify the use of the eavesdropping tapes before the Grand Jury by citing the *Costello* case, *supra*. The *Costello* decision could not have meant to license the importation of any unconstitutionally obtained evidence before a Grand Jury such as wiretap and/or electronic eavesdrop evidence in order to obtain an indictment. It is time for this Court to stop this distorted construction on the part of the overzealous prosecutors. It is no answer that these tapes were not played for the trial jurors' ears. Had these tapes not been made available for the Grand Jury's consideration it is more than likely that petitioner would not have been compelled to be tried since there would not have been any indictment found against her by the Grand Jury. The tapes consumed about four hours of listening time and it is reasonable to assume the prosecution hand-picked certain parts of these recordings to be played for the Grand Jury's benefit so as to magnify

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* References are to pages of the Index to Record on Appeal in Court of Appeals.

the Hedges' testimony out of proportion which resulted in the finding of the instant indictment.

There is no proof in the case that electronic eavesdropping surveillance upon client Charles Hedges, during his prison interviews by his wife and family, but the monitoring of his conversations in jail by the authorities could conceivably have forced Hedges to manufacture the tale against petitioner. We respectfully submit there is not an iota of incriminating evidence of any crime on these tapes concerning petitioner. After the alleged bribe offer was purportedly made to Charles Hedges by petitioner, the Government decided to strap an elctronic device on Hedges' person in order to obtain the proof. When the recorded eavesdropping tapes failed to support Hedges' contention of a supposed offer of a bribe, petitioner ought not have been arrested and indicted. The tapes clearly showed Hedges created a story for the tapes were shown to be negative. The prosecution represented to the Trial Court it would use the tapes on the trial but they refused and failed to do so. Of course, the tapes showed Hedges and his wife to have concocted their story.

The prosecution did everything in its power to mechanically "'reclarify" the tapes but due to co-petitioner Schawartzberg's supervision over these tapes by order of District Judges Tenney and Sugarman respectively, the Government abandoned its use before the trial jury. However, since the tapes were presented to the Grand Jury and in light of the questioning of petitioner by the Government which developed that Hedges had mentioned to petitioner someone had once brought him an offer of $25,000 not to testify against defendants in a narcotic conspiracy trial where he was the key witness, the Government elected not to play the tapes for the trial jury's consideration. Hedges tried his utmost to bait petitioner by telling her of the bribe offer. Petitioner advised Hedges to reject any such

offer, and the tapes support her. If Hedges' cousin, James Godwin (another special employee for the Government in another case docketed as No. 527 by co-petitioner Pacelli before this Court), had not apprised the defense of the contemplated "reclarification" of the tapes then the tapes would have been edited to incriminate petitioner. Under the doctrine of *Walder* v. *United States*, 347 U. S. 62 (1953) the prosecution could have used the tapes to rebut petitioner's trial testimony but they chose not to do so for they had obtained the conversation which had ensued as respecting the unknown bribe offerer.

Government witness Charles Hedges shocked the entire Courtroom when he testified that petitioner had stated to him he could have the $25,000 brought to him in cash during his confinement at the Westchester County Jail (90a).* Instead of wiring up Hedges all the Government had to do was to arrange with Hedges to have petitioner bring in the alleged $25,000 to him at the jail and they could then have arrested petitioner without any difficulty. This type of arrest would have been good police work as the monies would have been the best proof of a bribe offer. Criminal justice is not an equal game between two sides with the life or liberty of the prisoner as the stake. Unfortunately, petitioner is and has been physically handicapped since the age of three due to polio and after an arduous struggle to ascend to the practice of law it has taken a prosecution by three men (two of whom have resigned to enter private practice) to try to deprive petitioner of her life's work.

Prior to trial petitioners moved the District Court for an order to suppress the recorded eavesdropping tapes and its fruits. On oral argument the Civil Liberties Union of New York appeared in petitioner's behalf and argued that a counsel room in a jail assigned for that purpose is

* Reference is to page of Appellant's Joint Appendix.

an extension of an attorney's office (522-535)* and that while the privilege belongs to the client he cannot ostensibly be a client while practicing a deception upon his attorney that he is a client. Although the motion to suppress was denied the Government did not use the tapes at trial. The decision by the District Court denying the suppression thereof now permits the prosecution *carte blanche* to carry the ball over the goal line in all attorney-client conferences and this ought to be stopped now in the vast interest of the legal profession even though the prosecution purposely refrained from using the eavesdrop tapes before the trial jury.

In a recent decision unreported to date (NYLJ October 21, 1966, p. 1) the District of Columbia Circuit reversed the conviction of *Gregory* v. *United States,* decided July 28, 1966, and Judge Wright speaking for the majority said:

> "The court required defense counsel to request, receive and read the Jencks Act statements in the presence of the jury."

The same situation prevailed in the instant case as *Gregory, supra.* When defense counsel requested the Jencks Act statements relating to the witness' testimony at the close of the direct testimony he was immediately advised he would have to make the request in open Court in the presence of the jury. *Gregory's* counsel protested that just one week before the District of Columbia Circuit had handed down its opinion in *Johnson* v. *United States,* 347 F. 2d 803, 806 (1965) but the trial Judge stated he was familiar with the *Johnson* case but that he would not follow the procedure there indicated because in the trial

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* Refers to pages of the Index to the Record on Appeal before the Court of Appeals.

Court's judgment it was dictum. The Court, in reversing the judgment wrote as follows:

> "It is familiar law that prior consistent statements are not admissible in evidence, and consequently it is improper to require a procedure, in exercising Jencks Act rights, to require defense counsel to request and receive Jencks Act statements in the presence of the jury."

In petitioner's case objection was made by petitioner's counsel and by co-petitioner Schawartzberg regarding the turning over of the Jencks Act statements in the jury's presence. In view of the conflict in the production of the Jencks Act material in the jury's presence under the Jencks decision as reaffirmed by Congress in the Jencks Act, petitioner urges this Court to exercise its power to supervise the administration of justice in federal Courts and to establish a rule that motions for the production of Jencks Act statements should be made with the jury absent or unaware in order to avoid the undue prejudice which may arise from the jury's knowledge that Jencks Act statements were available to the accused.

The legislative history of Section 3500 of Title 18, United States Code, makes clear that the statute's provisions are not discretionary.

> "The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned . . . the proposed legislation . . . reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testi-

fied at trial . . . " 1957 U.S. Code Cong. & Admin. News 1862.

The only decision to be made by the trial Court is the decision as to relevance. Once relevancy is determined, production is commanded.

There is no doubt that the statement sought was a statement previously made by Government witness Patricia Hedges concerning her direct testimony. Nor is there doubt that the Government had constructive, if not actual possession of the statement, that it was available and in court during trial, and that the prosecutor had been made aware of the contents by Agent Miller. In the progenitor of Section 3500 of Title 18, United States Code, this Court, citing *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944) approvingly concluded:

> "in criminal causes ' . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . .' " *Jencks* v. *United States*, 353 U. S. 657 (1957), 671.

The Government's obligation under Section 3500 of Title 18, United States Code, should be more clearly defined by this Court.

Petitioner maintains that use of the recording devices at the Westchester County Jail and use of the tapes at the Grand Jury session was highly improper; petitioner attacked the truth of the recordings notwithstanding the fact

that they were exculpatory for the tapes were tainted, indiscernible in large part and were reclarified and the seal broken contrary to the Court's order; the Government and client Hedges practiced a deception upon petitioner by leading her to believe he was her client; created legal work for petitioner and consistently requested her to come to the jail and to bring his wife there and the Government then asserts that the petitioner made numerous visits to Hedges; the client sought out petitioner to tell her of a purported bribe offer to him, which she advised him to reject; petitioner didn't bring Hedges an offer of any kind of bribe; the vouchers will show that Hedges was compensated with a large sum of money in return for his testifying against petitioner; the Fourth Amendment extends to the counsel room of the jail and the tapes were unconstitutionally obtained and used by divulging the contents thereof to a Grand Jury.

This was a short trial, not a long one, which consumed about eight days less the time that the jury went home early to allow defendants an opportunity to examine the vast amount of Jencks Act material. The jury deliberated approximately thirty-six hours after the case was given to them. Charles Hedges could not have taken the privilege after he had already waived such privilege and the statute had run. He was a key witness against petitioner. He was not questioned about collateral matters. He was asked directly whether he had in fact committed certain hold-ups; not as to whom he had participated with or any of the plans leading to and following the robberies in question. These answers would have weighed heavily against Charles Hedges as to his credibility for the Government was not apprised of the commission of these robberies by the key witness himself. The Government permitted Hedges to invoke the Fifth Amendment even after it was

shown the statute had run. Besides, petitioner's mouth was wrongfully sealed by the Trial Judge and she was therefor unable to explain away the reasons for the visits and was unable to assail the key witness who had been instrumental in causing the indictment of petitioner.

Wigmore on Evidence, 8, McNaughton rev. 1961, §2328, subd. 6 recites in pertinent part: When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue. Here are some Federal cases on the subject. *Olmstead* v. *Webb,* 5 App. D. C. 38, 51 (1894) (attorney for deceased client admissible where his representatives charge the attorney with misconduct; "The object of the rule ceases, and the attorney is no longer bound by his obligation, when the client or his representatives charge him, either directly or indirectly, with fraud or other improper or unprofessional misconduct"); *Popovitch* v. *Kasperlik,* 70 F. Supp. 376, 381 (W. D. Pa. 1947) ("[W]hen the question of the integrity of a reputable member of the bar arises, the attorney should be entitled to explain the circumstances, since for him to keep silent would justify inferences being drawn that some act or deed was committed on his part that was not legal or in accordance with the direction of his client").

The Government has propositioned co-petitioner Schawartzberg as far back as June, 1962 to incriminate petitioner which stands undenied in this record. The indictment was returned against petitioners only after co-petitioner Schawartzberg had demanded his own arrest or dismissal of the rumors of indictment in November, 1965. He accused the Government of being a modern Javert and demanded a speedy trial. A recent case in the Ninth Circuit Court of Appeals, *Lenske* v. *United States,* decided October 5th, 1966, resulted in a reversal of the judgment

in a tax prosecution (U. S. Law Week, 11/1/66, 35 LW 2227) wherein the majority of the Bench stated in language appropriate here:

> "We reverse. This court will not place its stamp of approval upon a *witch-hunt,* a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. *This court will not be so used.*" (Emphasis ours.)

In the light that the Government was conducting a "witch-hunt" as to petitioner and took their time in arresting her, the unreasonable pre-arrest delay constituted a violation of "due process." The recent law reviews pertaining to constitutional law on pre-arrest delays may be found in the following:

a) New York University Law Review, Vol. 41, p. 638, May 1966 issue;

b) Iowa Law Review, Vol. 51, p. 670, 1966 issue;

c) Minnesota Law Review, Vol. 50, p. 970, 1966 issue.

It is apparent that the case of *Ross* v. *United States,* 349 F. 2d 210 (D. C. Cir. 1965) impelled the law reviews cited hereinabove. In petitioner's case her constitutional right to a speedy trial and "due process" of law was denied by the pre-arrest delay.

Petitioner does not agree with the learned jurist (Moore, *J.*) of the Second Circuit, who wrote the opinion in this case, when Judge Moore termed this great Court a rubber stamp, speaking as a panelist on Pre-Trial Discovery in Criminal Cases, Brooklyn Law Review, Vol. 31, p. 334, he said (re *Jackson* v. *Denno,* 378 U. S. 368):

"I wrote it with the Supreme Court in mind so that they could be saved some work, with all the other things they have to do, like FELA and reapportionment cases, I thought it was but fair to give them something so that they could, in fairness to the defendant—because, after all, that's our business—they could just rubber stamp my opinion. They did, but they rubber-stamped it with their rubber stamp of "reversed." They carry both kinds of stamps down there."

CONCLUSION

For the foregoing reasons in the reply brief and for the reasons set forth in her petition for a writ of certiorari, it is respectfully submitted that the petition for certiorari should be granted and we urge this Court to exercise its supervisory powers over the administration of federal criminal justice.

Dated: November 7, 1966.

FRANCES KAHN
Petitioner Pro Se

O. JOHN ROGGE
Of Counsel

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1966

Nos. 593 and 594

FRANCES KAHN and ISRAEL SCHAWARTZBERG,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI

PETITIONS FOR REHEARING

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PETITIONS FOR REHEARING

The respective petitions for a writ of certiorari in the above captioned matter were denied by order of this Court dated November 14, 1966.

Grounds for Rehearing

With deference to this great Court, due to the closeness of dates between the Court's consideration of the certiorari petitions and petitioner Kahn's Reply Brief it is apparent that this Court decided to deny certiorari prior to its receipt of the Reply Brief. This case is of the utmost importance and of great interest not only to the legal profession throughout the land but to the public as well. The denial of certiorari herein will grant a license to prosecutors throughout the country to eavesdrop upon conversations between attorneys and their clients and will

further grant the prosecutors *carte blanche* to import illegal and unconstitutional evidence before a body of Grand Jurors. It is respectfully and strenuously urged that this Court should exercise its supervisory powers over the administration of federal criminal justice in the instant case.

Petitioner Kahn received an acknowledgment from the Clerk of this Court dated November 15th, to the effect that her Reply Brief had been received. The Court's decision denying certiorari was dated November 14th, and of course, its decision was made prior thereto. Therefore, it is conceivable that this Court reached its decision to deny certiorari perhaps overlooking the salient points, *infra*. In the Reply Brief petitioner Kahn stressed the fact that the Solicitor General admitted, for the first time, that the eavesdropping tapes existing between petitioner Kahn and client Charles Hedges were divulged and played for the benefit of the Grand Jury in order to obtain the indictment against her. When the Solicitor General submitted his opposing Brief the said admission was artfully drawn and almost escaped the attention of petitioners. At first blush it would appear that the Solicitor General was not confessing the production of the tapes before the Grand Jury when we read its statement at p. "9" of their Brief:

> "Even *assuming, arguendo,* that the *recordings were incompetent evidence. . . .*"

The Solicitor General did not assume *"arguendo"* that the tapes were played before the Grand Jury but instead artistically stated "that the recordings were incompetent evidence", *supra*. The case of *Costello* v. *United States,* 350 U. S. 359 was not the intendment of this Court to permit the prosecution to import illegal and unconstitu-

tional evidence in order to find an indictment. Of significance is the fact that petitioners herein have consistently maintained such tapes were imported into the Grand Jury room but the prosecution below has steadfastly disclaimed our contention (please see petitioner Kahn's Reply Brief for the full treatment on this point). Since the Solicitor General's admission nearly went unnoticed insofar as petitioners are concerned then it is highly possible such admission escaped the Court's attention and was overlooked.

This is especially so when one considers the fact that petitioner Kahn stated in her Reply Brief p. 1 that:

> "The Government admits for the first time that the eavesdropping tapes between petitioner and her client at the Westchester County Jail was used before the Grand Jury in this case" [citing Government's Brief, p. 9].

The Solicitor General did not overcome petitioner's Reply Brief wherein she charged, as she did from the inception of the indictment, that electronic eavesdropping was used before the Grand Jury in order to obtain the indictment (see pp. 1-11 inclusive of her Reply Brief). Petitioner stated therein that the Solicitor General admitted using the tapes before the Grand Jury while the prosecutors in the Courts below denied such use and divulgence of said tapes.

It should be noted that after the petitions for certiorari herein were denied by this Court, petitioner Schawartzberg moved the District Court for a writ pursuant to Title 28, §2255, United States Code, alleging the eavesdrop tapes referred to, *supra,* were illegally and unconstitutionally utilized before the Grand Jury.

The indictment found in petitioners' case is distinguishable from *Costello* v. *United States,* 350 U. S. 359. The

evidence before the Grand Jury in *Costello* was competent although based on hearsay testimony while in petitioners' case the evidence before the Grand Jury was illegal since the indictment was bottomed upon the introduction of illegal and unconstitutional tapes as evidence which the Grand Jury had no right to consider.

The conferences between petitioner Kahn and Hedges were surreptitiously intercepted by law enforcement officials through concealed electronic monitorial devices built into the Westchester County Jail where her client was serving his federal sentence. *Black* v. *United States,* a comparable situation; cf. *Davis* v. *United States,* both reported in 35 LW 3164, should point up petitioner Kahn's case as one which may have been overlooked by this Court due to the voluminous record and extensive petitions for certiorari filed herein.

The Civil Liberties Union of the City of New York has written petitioner Kahn a letter stating it would file a brief *amicus curiae* if the petition for certiorari would be granted. The aforesaid civil libertarians also appeared for petitioner Kahn on the pre-trial motion to suppress the eavesdropping tapes in question.

Petitioners vehemently urge this Court to reconsider its denial of certiorari on another point, to wit: the reversal in the case of *Black* v. *United States,* decided November 7th, 1966, reported thus far as 35 LW 3164.

CONCLUSION

For the reasons set forth above and in the respective petitions for writs of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

FRANCES KAHN and
ISRAEL SCHAWARTZBERG
Petitioners Pro Se

Certificate of Counsel

We hereby certify that the foregoing joint petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Dated: November 18, 1966.

/s/ .....
FRANCES KAHN
Petitioner Pro Se

/s/ .....
ISRAEL SCHAWARTZBERG
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